INDEX

AUTHORITIES

39535—25——1

Supreme Court Cases:

Other Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA, plaintiff in error
v.
WALTER S. DICKEY AND RALPH ELLIS } No. 768

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

THE UNITED STATES OF AMERICA, plaintiff in error
v.
THE BALTIMORE POST } No. 847

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

THE DICKEY CASE[1]

On November 25, 1924, the indictment set out on pages 2–9, inclusive, of the Transcript of Record in No. 768 was filed in the District Court for the Western District of Missouri. The indictment was in six counts, each charging Walter S. Dickey, as owner and editor of the Kansas City Post and other newspapers, and Ralph Ellis, as managing and

[1] 3 Fed. (2d) 190.

supervising editor of the same publications, with printing and publishing a part of the income-tax return of a named income taxpayer, specifically, with printing and publishing the name of a taxpayer and the amount of his income tax, as "Frank C. Niles * * * Tax, $32,381.99." The several counts were identical, except that each charged the printing and publication of the name and amount of the income tax of a different individual. It was further alleged in each count that on or about the time of the printing and publication charged there was prepared and made available for inspection at the office of the Collector of Internal Revenue at Kansas City, Missouri, a list of income taxpayers and amounts paid by each, and that the printing and publication charged was done after an examination of this list, thus made available for inspection but "not for the purpose of being printed or published in newspapers or public prints."

The defendants separately demurred to each count of the indictment on the general ground that it was not sufficient in law. The demurrers appear in the Transcript of Record on pages 10 to 29, inclusive. They were sustained by the District Court (R. 29), which, in its opinion (R. 31–34, inclusive), held that the acts charged did not constitute a violation of the statute and that if they did constitute a violation of the statute, then the statute was invalid because violating the First Amendment of the Constitution.

THE BALTIMORE POST CASE [2]

This case is not distinguishable in its facts from the preceding case. It arises on a demurrer to an indictment found in the United States District Court for the District of Maryland, which charged that the defendant, The Baltimore Post Company, as publisher of The Baltimore Daily Post, had printed on March 15, 1924, the amount of the tax paid by one Frank A. Furst, and it contained the same averment as was set forth in the *Dickey* indictment that—

> afterwards, to wit, on October 24, 1924, a list of income tax payers in said collection district, containing the name of said Frank A. Furst and showing the amount of said income tax so paid by him to said collector, was prepared and made available to inspection in said office of said collector at Baltimore aforesaid in the manner determined by said Commissioner of Internal Revenue, not, however, to be printed or published in newspapers or public prints. (Rec. p. 3.)

Mutatis-mutandis.—The indictment in the Baltimore Post case is identical with that in the *Dickey case,* and therefore its averments need not be further recited.

THE STATUTES INVOLVED

The statutes involved are that part of Section 1018 of the Revenue Act of 1924 (Act of June 2, 1924, Ch. 234, 43 Stat. 253, 344, 345), which reenacts

[2] 2 Fed. (2d) 761.

Section 3167 of the Revised Statutes and subdivision (b) of Section 257 of the Revenue Act of 1924 (43 Stat. 293). They are as follows:

Section 1018, reenacting Section 3167 R. S.:

> It shall be unlawful for any collector, deputy collector, agent, clerk, or other *officer or employee* of the United States *to divulge or to make known in any manner whatever not provided by law* to any person the operations, style or work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof, or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; *and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof* or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment. [Italics ours.]

Subdivision (b) of Section 257:

> (b) The Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal revenue district and in such other places as he may determine, lists containing the name and the post-office address of each person making an income-tax return in such district, together with the amount of the income tax paid by such person.

The First Amendment of the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

QUESTIONS INVOLVED

The two questions presented by the Record are:

First. Assuming the validity of Section 3167, R. S., as reenacted, does the indictment charge a crime under that Section?

Second. Does Section 3167, R. S., violate the Constitution?

30535—25——2

ARGUMENT

I. The acts charged fall within the prohibition of Section 3167 R. S.

Section 3167, R. S., reenacted as Section 1018, prohibiting, among other things, the printing or publishing of income-tax returns or any part thereof, has been a provision of the Income Tax Law since the first Act adopted under the Sixteenth Amendment. It was not changed in the Revenue Act of 1924 nor was there any attempt from the introduction to the adoption of the Act to change this provision. It prohibits under a penalty prescribed any taxing officer divulging any matter contained in any return or the printing or publishing of any return or any part thereof by any person.

What is the "*return*" the publication of which or any part thereof violates this section?

In the first income tax law under the Sixteenth Amendment the provision governing "returns" was (Act of Oct. 3, 1913, c. 16, Section II, Subdivision D, 38 Stat. 114, 168):

> On or before the first day of March, 1914, * * * a true and accurate return, under oath or affirmation, shall be made by each person of lawful age * * * subject to the tax imposed by this section, and having a net income of $3,000 or over for the taxable year, to the collector of internal revenue * * *, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury shall pre-

> scribe, setting forth specifically the gross amount of income from all separate sources and from the total thereof, deducting the aggregate items or expenses and allowance herein authorized * * *

The Act did not in terms require the taxpayer to set out in the return as a part thereof the tax which he would be liable to pay.

The Revenue Act of Sept. 8, 1916 (39 Stat., c. 463, section 8(b), 756, 761) made no change as to what the " return " should contain. Nor was there any change in that regard in the Revenue Act of 1919 (40 Stat. 1074); nor in the Revenue Act of 1921 (42 Stat. 250); nor in the present Act (43 Stat. 253, 280).

But it does not follow that the " return " is only what the law in terms specifically requires shall be contained therein. Not only does the law expressly authorize the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to prescribe the form of the return (38 Stat. 168; 39 Stat. 761; 40 Stat. 1074; 42 Stat. 25; 43 Stat. 280), but in Section 1303 of the Act of 1921 (42 Stat. 309) it provides:

> That the Commissioner with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.

By virtue of the authority conferred by these provisions, regulations have been made. (Regulations 62, Income Tax, Art. 402, page 157.) They

have the force and effect of law. They require, among other things, the setting out in the return as a part thereof of the name of the taxpayer and the amount of tax for which he is liable.

It is obvious that it is not the intention of the law that the return shall contain only what is required in terms to be therein stated by Sections 223 (43 Stat. 280), and 239 (43 Stat. 287), that is the gross income and legal deductions therefrom, for, in that case, the tax could not be calculated from the return. For instance, the tax could never be calculated unless the taxpayer declared his family status, upon which personal credits and exemptions depend. Again, the application of the surtax as distinguished from the normal tax in the Act could not be made unless the amount of dividends received by the taxpayer from corporations was specified. The intention was that the requirements as to the return, other than the essentials named in the Act itself, should be, as they are, provided for by regulations.

The complete return required by the law and regulations is therefore the "return," the printing or publishing of the whole or any part of which is prohibited by Section 3167, R. S. The name of the taxpayer and the amount of his tax certainly are parts of this return.

We think, therefore, that it can not be doubted that at least prior to the enactment in 1924 of subdivision (b) of Section 257 in the Revenue Act of that year a newspaper publication of the name of

an income taxpayer and the amount of his tax was under the law a crime. Was the law changed in this regard by subdivision (b)?

We approach the question by pointing out that we have here no problem of repeal. Section 3167, R. S., which, as we contend, makes the publication involved a crime, was reenacted in the Revenue Act of 1924 as Section 1018. As between Sections 257 and 1018 the latter is, of course, the last expression of the legislative will, and as such prevails if between them exists, as we think there does not, an irreconcilable conflict. *Merchants National Bank of New Haven* v. *United States,* 214 Fed. 200.

The problem is, whether when these two sections are read together and in the light of the whole Act, Section 257 so modifies the plain meaning of Section 3167, R. S., as it would undoubtedly be construed without Section 257 (43 Stat. 270), as that it must be said it was not the intent of Congress that the publication in newspapers of names and amounts of taxes paid should longer constitute violation of the law.

Laws are to be construed so as to carry out the intention of the legislature (*United States* v. *Stowell,* 133 U. S. 1, 12), and that intention must be found from the language used. (*Merritt* v. *Welsh,* 104 U. S. 694, 702.) It follows that the two sections of the same Act with which we are here concerned must be reconciled, if possible, and full effect be given to the provisions of each. No part of either

should be permitted to perish by construction. (*United States* v. *Ninety-nine Diamonds,* 139 Fed. 961; *State ex rel. Arpin* v. *Eberhardt,* 158 Wis. 20.) Section 257(b) should not be allowed to even restrict the meaning of any word of Section 3167 if by reasonable construction that can be avoided. Thus in *Washington Market Company* v. *Hoffman,* 101 U. S. 112, 115, the Court said:

> We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as Bacon's Abridgment, it was said that " a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."

So also words are to be understood in their natural, ordinary, and familiar meaning. (*Treat* v. *White,* 181 U. S. 264; *Columbia Water Co.* v. *Columbia Co.,* 172 U. S. 475.)

If now these familiar rules be applied and Sections 257(b) and 3167, R. S., [redacted] read together, their effect is to authorize the Commissioner of Internal Revenue to make available to *public inspection,* in the offices of Collectors of Internal Revenue, or such other places as he may determine, lists showing the names of taxpayers and the amounts of income tax, respectively, paid by them, but not to authorize the publication of such lists, for the rea-

son that they comprise data derived from and constituting part of income-tax returns, the *printing or publishing* of which, unless authorized by law, is specifically prohibited.

The phrase "available to public inspection" does not impart a right "to print or publish." Webster (New International Dictionary) defines "inspection" to mean "a strict or prying examination; close or careful scrutiny; investigation." This definition was adopted in *Pabst Brewing Company* v. *Crenshaw*, 198 U. S. 17. "Public" is defined as meaning "open to the knowledge or view of all; general; common; notorious * * * open to common or general use." *Webster's New International Dictionary.* So "available to public inspection" merely means open to all to examine and view. But "to print or publish" means something entirely different. "Publish" is defined, when used in connection with newspapers, as meaning "to bring before the public as for sale or distribution; especially to print, or cause to be printed, and to issue from the press, either for sale or general distribution. *Webster's New International Dictionary.* The use of the word "print" in connection with "publish" in Section 3167, R. S., is significant. It gives emphasis to the fact that the word "publish" as there employed is used in the sense of distribution by the press. Now, to hold that "*available for public inspection*" implies a right to "*print or publish*" is to ignore these distinctions in definition, is to go contrary to the

recognized rules of statutory interpretation, is to defy what seems to us the plain intent of the Act to distinguish between that "*inspection*" which is allowed by Section 257(b) and that "*printing or publishing*" which is prohibited by Section 3167, R. S.

The distinction between "*inspection*" and "*print or publish*" is shown in Section 257 itself, in subdivision (a) thereof. Section 257 (a) provides that a shareholder of a corporation may examine the income return of his corporation, but expressly imposes a penalty similar to that imposed in Section 3167 upon any such shareholder making known in any manner any information so gained. So also a distinction is made by Congress in the Section immediately following Section 257. Section 258 (43 Stat. 293) provides that the Commissioner—

> * * * shall prepare and publish annually statistics reasonably available with respect to the operation of the income, war profits, and excess profits tax laws, including classifications of taxpayers and of income, the amounts allowed as deductions, exemptions, and credits, and any other fact deemed pertinent and valuable.

This is the only authorization to "*publish*" income-tax data to be found in the Revenue Act of 1924. The obvious intent of this provision is to authorize the *publication* of information bearing upon the operation of the income tax law in gen-

eral, without specific reference to specific data as to the income of individual taxpayers, which latter, as has been seen, the terms of 257 (a) (43 Stat. 293) and 257 (b) just preceding had specifically limited to *inspection* only.

That by "*inspection*" as used in Section 257 (a) and 257 (b) is meant only the right to examine or view and nothing more is further shown by the fact that in the first proviso in 257 (a) giving certain Congressional committees the right to "*inspect*" returns Congress deemed it necessary to affirmatively provide that the information so obtained "may be submitted by the committee obtaining it to the Senate or the House, or to both the Senate and House, as the case may be." The necessary inference here is that in the absence of this specific authority the right to *inspect* would not carry with it the right to *communicate* the information so obtained even to the Congress itself.

It is not thought a reasonable construction of a statute to say that "print or publish" was intended by Congress to be expressed in the term "available to public inspection" when it would have been just as easy, and in strict accordance with its other uses of the word "publish" to say "publish," if that was meant.

If it be contended that Section 257(b) is special in its terms and Section 3167, R. S., general, and therefore the former constitutes an exception to the latter, still the publication of income-tax data in a

newspaper would be grounds for prosecution for the reason that Section 257(b) provides that the Commissioner of Internal Revenue *alone* shall make " available to public inspection " certain income-tax data shown upon returns in the manner provided therein and that it shall be so available *only* in the offices of Collectors of Internal Revenue or such other place as he may designate; whereas it is obvious the *publishing* of such data by the owner of a newspaper constitutes the making of it available by a person other than the Commissioner, in a place other than that provided by Section 257(b) or determined by the Commissioner under the authority thereof, and in a manner not authorized.

This leads us to a discussion of his discretionary power.

II. The qualified right of inspection is subject to discretionary power of the Commissioner of Internal Revenue

In departing, to a limited extent, from the policy of secrecy which had been a part of our fiscal policy since the income tax of 1870, the Court will not fail to notice that Section 257, subdivision (b), left the manner and the method of " inspection " to the discretion of the Commissioner of Internal Revenue. It was the Commissioner of Internal Revenue and not the newspaper publishers to whom this delicate and important matter was entrusted. It was the Commissioner who was to make " available to public inspection " the lists of income-tax payers, but

only "in such manner as he may determine," and the inspection was only to be "in the office of the collector in each internal revenue district and in such other places as he may determine."

If Congress had intended to open the doors to unlimited inspection, the Congress would not have been so careful to make the right of inspection subject to the discretionary powers of the Commissioner of Internal Revenue. For this there were obvious reasons.

The inspection may be asked for a legitimate purpose, or it may be asked from idle curiosity, or even from an attempt to injure the credit of another. Many States have statutes which require the lists of stockholders to be available to the stockholders, but it has been held that such a right can not be exercised for an improper purpose.

Similarly, in respect to the present law, Congress obviously intended that the Commissioner should allow a reasonable inspection—that is to say, an inspection for legitimate purposes—and if this construction of the law be sound, and it would seem to be a reasonable one, then it was for the Commissioner to determine the extent to which the right of inspection should be permitted. He might well determine that no one should inspect a list unless he could show what part of the list interested him, and could further show that that interest was legitimate. It might well be that one man may have, for business reasons or otherwise, legitimate right to know what tax another man is

paying. He may have reason to believe that a citizen is evading his taxes, but he could not know this definitely, or make a specific charge, unless he knew the precise tax that the citizen was, in fact, paying. For these reasons Congress evidently left it, to a very large extent, to the discretion of the Commissioner as to the conditions under which and the purposes for which an inspection could be granted. It did not intend to give an unlimited warrant to the numerous Paul Prys of the community, even though they said, as Paul Pry said, "I hope I don't intrude." There was no purpose to create trouble, destroy credit, and paralyze initiative by giving a legal warrant to eavesdropping in respect to this important matter.

I repeat, it was for the Commissioner, in the light of common fairness and for public reasons, to authorize the inspection, and not for the newspaper publishers to commercialize a public record and swell their circulation, by making possible universal intermeddling in other people's business. If, therefore, the newspaper publishers gave wide circulation to that which was essentially confidential information without the authorization of the Commissioner of Internal Revenue they did so in the dangerous and most offensive way by broadcasting, through the public press, the private details of a man's personal resources. These thrifty purveyors of sensational news did so at their own peril, and certainly they can not find in the

Act of Congress any justification for their course when the same Act upon which they expect to rely provided so unequivocally that "it shall be unlawful for any person to print or publish *in any manner whatever* not provided by law any income return, or any part thereof."

In connection with this point, it should be remembered that the indictment, whose verity is admitted by the demurrer, avers (Rec. pp. 2–3), after stating the assessment and payment of the tax—

> that thereafter, to wit, on or about October 24, 1924, a list of income-tax payers within the said collection district, containing the name of Frank C. Niles, showing the amount of said income tax, determined as aforesaid, and paid by him to the said collector of internal revenue, was prepared and made available to inspection in the said office of the said collector of internal revenue at Kansas City, State of Missouri, aforesaid, for all lawful purposes and in the manner determined by said Commissioner of Internal Revenue, but not for the purposes of being printed or published in newspapers or public prints.

The fair interpretation of this averment is that the Commissioner, acting under the discretion above referred to, had limited the right of inspection to "lawful purposes" and had not authorized such inspection "for the purposes of being printed or published in newspapers or public prints."

The contention, if it should be made, that the publication by the newspaper does not violate the

provisions of Section 3167, R. S., for the reason that the information was secured not from the return itself but from a list separate and apart therefrom, is a highly illogical construction of the law amounting to a palpable begging of the question.

The information contained in the list in question was compiled directly from the returns themselves and constituted an essential and vital part of such returns. Anything appearing on the face of the return is a part thereof. Its identity would be retained no matter where subsequently listed or printed. Merely because it is secured indirectly instead of directly from the returns, can not in any way change its character as part of such returns. The names and amounts originate as part of the returns and so they remain wherever found so long as they agree in spelling and amount and purport, as in the present case, to represent a taxpayer's dealings with the government relative to his income tax. Clearly this is so. To hold otherwise is not only illogical but renders the provisions of Section 3167, R. S., a nullity for all practical purposes. For example, suppose under the provisions of Section 257 (a), providing that—

> Returns * * * shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary, etc.—

a person lawfully came into possession of all the information contained in a return and he then com-

municated such information to another person who in turn printed and published it. Under these circumstances, by parity of reasoning, Section 3167, R. S., would not apply to such printing and publishing for the reason that the second party had not obtained the part of the return published by him directly from the return itself.

Again, for example, a person who could not possibly have had access to returns, through disloyalty of an unknown employee, could indirectly obtain and print and publish information contained in returns; yet there could be no prosecution, because it could not be proven that the party so publishing had obtained such information directly from the return. By the same token, even if the disloyal employee were discovered, the party actually publishing the information would still go unpunished. Similar examples could be multiplied, but the above are sufficient to point out the absurdity of this position.

That Section 3167, R. S., was designed to meet just such contingencies as the above is clearly shown when that section is viewed as a whole. It will be observed that it is in two distinct parts. The first part relates to the divulging of information contained in returns by employees who, of course, have free access thereto, and the second part to the printing or publishing of any part of a return by any other person. Manifestly, by two such distinct provisions, it was intended to protect not only the source of information but also to

guard it in any channel in which it might subsequently flow. It is an offense to " print or publish * * * any part of a return except as specifically provided by law," entirely without reference to the manner, time, or place of its acquisition. To give any other interpretation to 3167, R. S., is to render its provisions wholly ineffectual so far as the accomplishment of its primary purpose is concerned.

As to the contention that this construction leads to an absurd result, in that it punishes one for publishing in printed form what he is at perfect liberty to communicate orally, it is sufficient to invite the court's attention to the fact that that is quite frequently the case with regard to many laws. For instance, one may communicate by word of mouth information concerning lotteries which he may not print and send through the mails. Again, one may orally recite any portion of a copyrighted book or article, which it would be unlawful for him to print or publish. Such examples could be multiplied indefinitely.

To briefly summarize, the conjoint effect of Section 257(b) and Section 3167, R. S., as amended and embodied in Section 1018 is to entitle the public to mere *inspection* of the lists in question, and only in the offices of Collectors or elsewhere as determined by the Commissioner (in the instant case nowhere else) with the *publication* of the data contained in said lists by the Commissioner or anybody else being specifically prohibited, for the reason

that while Section 257(b) is an exception to the first part of Section 3167 so far as *inspection* is concerned, it does not constitute an exception to the second part of Section 3167, R. S., which relates to *printing and publishing*—an act entirely different and distinct from inspection. If it had been intended to make the exception claimed from the universality of the prohibition against *printing and publishing,* it is fairly to be presumed this would have been done either by amendment to Section 258 (a previous express exception) or by the use of terms in Section 257(b) definitely indicative of that intention.

In construing the above sections the fact that they are penal has not been lost sight of, but effect is to be given to the plain meaning of the language of penal statutes in the same manner as in the case of other statutes. (*Bolles* v. *Outing Company,* 175 U. S. 262; *Wilson* v. *Wentworth,* 25 N. H. 245, 247.)

> The rule that a penal statute must be strictly construed does not preclude the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, and is not violated by giving the words of the statute a reasonable meaning according to the sense in which they were intended, and disregarding captious objections and even the demands of exact grammatical propriety. 25 R. C. L. 1085.

The rule that penal statutes are to be construed strictly is not violated by allowing their words to

have their full meaning, or even the more extended of two meanings, when such construction better harmonizes with the context. (*United States* v. *Hartwell,* 6 Wall. 385.) Chief Justice Marshall said that the rule of strict construction of penal statutes "is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation * * * would comprehend." *United States* v. *Wiltberger,* 5 Wheat. 93 (95). See also *United States* v. *Reese,* 27 Fed. Cas. No. 16137; and *State* v. *Bishop,* 128 Mo. 373, 384; 29 L. R. A. 200.

> If a statute creating or increasing a penalty be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted, but it is not justifiable in this, any more than any other case, to imagine ambiguties merely that a lenient construction may be adopted. If such were the privilege of the court, it would be easy to obstruct the public will in almost every statute enacted, for it rarely happens that one is so precise in its terms as to preclude the exercise of ingenuity in raising doubts about its construction. *Commonwealth* v. *Martin,* 17 Mass. 359, 362. See also *United States* v. *Huggett,* 40 Fed. 636, 637.

With regard to the question of inspection of public records generally, in 34 Cyc. 585, public records are defined as written memorials made by a public officer authorized by law to perform that

function and intended to serve as evidence of something written, said, or done. With respect to inspection of such records, in 34 Cyc. 592, it is said that at common law no person was entitled to inspect public records either personally or by agent, or to make copies, abstracts, or memoranda therefrom unless he had an interest therein. In some jurisdictions, however, the necessity of interest has been done away with by statute and any person may examine public records and make memoranda therefrom.

Through the cases cited by Cyc. in support of this rule, is to be observed the distinction between the simple right of inspection and the right to take copies and memoranda.

As to whether a person has, *in the absence of express statutory authority,* the right to inspect and take memoranda from public records for the purpose of publication, 34 Cyc. 594, states that there is a conflict of authority, it being held in *Buck* v. *Collins,* 51 Ga. 391, that such right does not exist, while in *In re License Docket,* 4 Pa. Dist. 162, the contrary view obtains. Both opinions, however, recognize that publication is something entirely distinct from inspection.

The statement is also made in 23 R. C. L. at page 160 that it has been held that no one has a right to examine and obtain copies of public records from mere curiosity or for the purpose of creating public scandal, citing *In re Caswell,* 18 R. I. 835 and Note 27 L. R. A. 82.

In *Buck* v. *Collins,* 51 Ga. 391, involving the right of a private citizen to inspect the records of deeds, mortgages, etc., contained in the Clerk's office of a Georgia court, it was said:

> The necessities of society and the protection of those dealing with property require that these records shall exist. That the title to land, the fact that mortgages or judgments exist, shall be capable of being inquired into by those interested. This is, as we have said, a necessity of society, and this necessity begets the necessity for books and records. The character of one's title, and whether one has mortgages or judgments against him, is thus of *necessity* open to inquiry, and the public, by providing books and records, meets this necessity. Men are required, for the protection of purchasers and to secure fair dealing, to put their titles upon record, and to expose, in some respects, what they may have strong inducements to keep secret. But while the public interest thus provides a mode by which anyone may learn the truth upo. *inquiry,* it is no part of the public scheme to make this exposure universal. It provides that those who seek the information can get it, but it does not and ought not to flaunt the information its records contain before the public gaze, and thus make a scandal of a public necessity. The object of the record is to furnish to those *needing* it the information the record contains. That object is attained when its books are open to inquiries as these occa-

> sions present themselves. The object sought by the complainant, to wit, to put the substance of these records into print, to be sold and put in the hands of anyone who may chance to buy or to borrow, is an extension of this publicity beyond the necessities which make the record justifiable, and is a perversion of the object sought by the requirement to record. It is an unnecessary flaunting of private matters before the public gaze.

This language is quoted with approval in *Belt* v. *Prince Georges County Abstract Co.*, 73 Md. 289, 295.

If this position is taken in the absence of a statute, *a fortiori,* it is compelled in the present case where there is a statute expressly prohibiting publication.

III. The provisions of Section 3167 are within the powers conferred upon Congress by the Constitution

There is no question of the power of Congress to lay and collect revenue for the support of the Government. The question, therefore, is simply one of the means which Congress may use to execute this admitted and important power. Here also the principle governing the matter is clear and undisputed. Any means having a fairly natural relation to the lawful end, considered from the point of view of the importance of the end and the agencies ordinarily employed in the civilized world as it is, are legitimate, if not contrary to any other provision of the Constitution. The courts have shown themselves

loathe to critize the means employed, if any reasonable person could consider them appropriate. These principles are axiomatic.

The question then narrows down to whether there exists a reasonable relationship between the power to lay and collect revenue and the prohibition of Section 3167, R. S., as amended and embodied in Section 1018 of the Revenue Act of 1924. The learned court below held that a reasonable relationship does not exist for the reason that at the time of publication—

> The power of Congress to enforce the payment of the tax had been made effective and had been concluded, and with the final exercise of the chief power granted to Congress the incidental powers would of necessity be at an end.

Aside from the patent fact that the power to tax even as it relates to the particular returns involved is not exhausted at least until the running of the statute of limitations (see Sections 273 to 282, inclusive, of the Revenue Act of 1924, 43 Stat. 296–302), the obvious error here, we urge respectfully, consists in construing the inhibition of Section 3167, R. S., as relating only to returns which have already been filed, overlooking its relationship to returns to be filed in future years. The main ground on which prohibition of publication of data contained in income returns is based is to secure fuller and more accurate returns of taxable income by assuring taxpayers that their private and con-

fidential financial affairs will not be unnecessarily flaunted before the public gaze. In this connection, the following quotation from a letter of Mr. Cordell Hull relating to these very provisions of the Revenue Act of 1924 (Cong. Rec. Vol. 65, part 8, p. 7684, 7685) is highly informative and pertinent:

> The first Civil War income tax acts did not prohibit publicity. The Commissioner of Internal Revenue early recommended a provision of secrecy to Congress. This was disregarded, however, until the income tax act of 1870 was enacted. A lengthy debate on this act occurred in Congress, during which Garfield referred to one feature of the income tax "which has made it very odious in many parts of the country," namely, publicity of returns. The outcome of the discussion was the insertion of a provision in Section 11 requiring secrecy, and it became a law. The view on which this provision was inserted was that it would meet the complaint that income tax laws are inquisitorial and also that publicity often discloses secret trade processes, methods, etc., even though ever so legitimate, and that, therefore, a taxpayer would be more encouraged to make a full and complete return when he had the assurance that his trade secrets, processes, etc., would not be exposed to his competitors.

The following are analogous cases in which the incidental powers of Congress were involved:

In *Ex parte Curtis*, 106 U. S. 371, the act prohibiting certain officers of the United States from

requesting, giving to, or receiving from any other officer money, etc., for political purposes was held constitutional, although Judge Bradley in his dissenting opinion pointed out that the effect was to prevent officers from exercising their right as individuals.

In *United States* v. *Newton,* 9 Mackey (D. C.), 226, the further act prohibiting soliciting contributions for political purposes in public buildings was held constitutional. Reference is made to the language on page 231 as to the protection of public buildings from any acts which Congress deems detrimental to the public service. This case is referred to with approval by the Supreme Court in a case of prosecution under the same act, *United States* v. *Thayer,* 209 U. S. 39, 44, 45, where the court says:

> Here the defendant was within and subject to the jurisdiction of the United States to the extent of its constitutional power, and the power is not in dispute.

In the *Burton Case,* 202 U. S. 344, an act prohibiting certain officers from practicing before the Departments was sustained.

There are certain other cases not involving officers which illustrate the power of Congress in the use of means where the end is legitimate that are closely analogous to the present case.

In *United States* v. *Gettysburg Electric Railway,* 160 U. S. 668, it was held that Congress had power to provide for the condemnation of land in

order to erect monuments in commemoration of a battle of the Civil War.

In *Halter* v. *Nebraska,* 205 U. S. 34, it was held that a State could prohibit the use of the national flag for advertising purposes.

So in regard to the power of taxation it is held in *McCray* v. *United States,* 195 U. S. 27, that Congress has power to regulate the coloring of oleomargarine.

So the constitutional power to borrow money may be exercised to prevent State banks from issuing circulating notes. *Veazie Bank v. Fenno,* 8 Wall. 533.

So also the power to regulate commerce with the Indians, in *United States* v. *Holliday,* 3 Wall. 407, 416, was held to include the power to prohibit the sale of liquor to them, although they were citizens of the State, and did not live on any reservation.

The power to coin money includes the power to prohibit not simply the counterfeiting of money but also the uttering of counterfeits and the making of anything in the similitude of United States or foreign obligations (*United States* v. *Marigold,* 9 How. 559, 566; *Ex Parte Holcomb,* 2 Dillon 392; *United States* v. *Williams,* 14 Fed. 550; *United States* v. *Stevens,* 52 Fed. 120), although the likeness of the counterfeit might not be such as to deceive an ordinary person.

Finally, attention may be directed to *Haas* v. *Henkel,* 216 U. S. 462. Prior to the decision of that

case it might undoubtedly have been argued vigorously that the Federal Government had no power to punish one for interfering with its right to have its cotton-crop reports regularly issued and promulgated. Yet such is the law. The court in that case held that the regulations of a department of the Government promulgated under Section 161, R. S., which authorizes the head of a department to "prescribe regulations not inconsistent with law for * * * the preservation of its records," etc., have the force and effect of law, and sustained a conviction under Section 5451, R. S., for bribery of an officer of the United States to violate such regulations. The power of Congress by legislation to regulate the use of public records must of necessity be greater than the derivative authority of the head of a department.

With respect to the suggestion in the opinion of the learned court below that Section 3167, R. S., as amended and embodied in Section 1018, is an attempt to regulate matters of a purely local nature, presumably in violation of the Tenth Amendment to the Constitution, it is submitted that *McCulloch* v. *Maryland*, 4 Wheat, 315, 422 (424), disposed of the argument. The Federal power to lay and collect taxes is complete and supreme in its field. The National Government is not required to look to the States for the means of exercising and en-

forcing this vital national power. As stated in the *McCulloch case*, supra—

> No trace is to be found in the Constitution of an intention to create a dependence of the Government of the Union on those of the States for the execution of the great powers assigned to it. Its means are adequate to its ends, and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it can not control, which another Government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other Governments which might disappoint its most important designs, and is incompatible with the language of the Constitution.

IV. The provisions of Section 3167, R. S., do not constitute an invasion of the rights secured by the First Amendment to the Constitution

The language of the Amendment is:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press * * *.

At once it will be noted that whereas it is provided that Congress shall make no law respecting the establishment of religion or prohibiting its free exercise, in regard to the freedom of the press it is merely provided that the right thereto shall not be abridged. This provision clearly refers to the law

prior to the adoption of the Constitution, and intends to fix the liberty of the press by that law. What such liberty was at the time of the adoption of the Constitution, that it shall continue to be, no more, no less. This meaning is attributed to the Constitution by the committee of the House of Representatives reporting on the alien and sedition laws in 1799. (American State Papers, Vol. I, Miscellaneous, 181, 183.) It is hardly possible that a Committee of Congress so soon after the adoption of the Constitution would have given an incorrect construction of the Constitution on such an important point.

In order, therefore, to understand the meaning of " freedom of the press " it is necessary to examine the common law and the statutes of the several States existing at the time the Constitution was adopted. At that time the statutes appear to be practically silent on the subject, and the common law as it then existed must be our guide.

The Petition of Right in 1628 and the Bill of Rights in 1689 made no reference to freedom of the press. *2 Watson on the Constitution, 1399.*

Under the common law the freedom of speech and of the press was strictly circumscribed. To publish a book or paper without the consent of censors was a crime. *De Lolme's Constitutional History of England,* 259. It was not until 1719 that free printing was allowed in Massachusetts.

Indeed, Blackstone (Vol. IV, pp. 151, 152), Kent (Vol. II, p. 17), and DeLolme, *supra,* are authori-

ties for the view that freedom of the press essentially consisted in freedom from censorship, which had been from time to time exercised in England and more infrequently in the colonies, and, forbidding such censorship, it left to the individual the freedom to publish what he chose, subject to such consequences as might be provided by either the common or the statutory law. This view has great authority in its favor, from Milton's Areopagitica, including the activities of the Star Chamber and Erskine's efforts in behalf of free speech down to *Patterson* v. *Colorado,* 205 U. S. 454, 462. In this case the court said that the main purpose of the constitutional provisions of the First Amendment was " to prevent all such *previous restraints* upon publications as had been practiced by other governments and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."

Even though it be admitted that freedom of the press be not limited merely to exemption from censorship before publication, there is no authority for the conclusion that the First Amendment restricts the powers of Congress to declare criminal and provide punishment for the publication of matters which interfere with the exercise of any of its constitutional powers. *2 Willoughby on the Constitution,* 844.

" Freedom of speech, or of the press, is the right to speak, write, or publish, what one chooses, so long as he does not *violate a law,* or injure one's

character, reputation, or business, or does not violate public morality." *2 Watson on the Constitution,* 1401.

The prohibition laid upon Congress by the First Amendment to the Constitution has given rise to comparatively few decisions by the Supreme Court and in no instance has the constitutionality of an act of Congress been seriously questioned on that ground by that tribunal. *Willoughby on the Constitution,* 842.

The Sedition Act of 1798 did not come before the Supreme Court, but it was upheld as constitutional by three Federal Judges. *Trial of Matthew Lyon,* Wharton's State Trials, 333; *Trial of Thomas Cooper,* id. 659; *Trial of J. F. T. Callender,* id. 688; *Trial of Anthony Haswell,* id. 684.

The Civil Service Act of 1876, which restricted the political activities of Government officeholders, was attacked as contrary to the First Amendment. Its constitutionality was upheld. *Ex parte Curtis,* 106 U. S. 371.

Liberty of the press does not include the right to publish libels, nor to be indemnified against the legal consequences of such action. *Robertson* v. *Baldwin,* 165 U. S. 275.

Statutes and ordinances prohibiting the exhibition of motion pictures which have not previously been submitted to censors do not violate the First Amendment. *Mutual Film Corporation* v. *Industrial Commissioner of Ohio,* 236 U. S. 230, 243.

The First Amendment can not be interposed to defeat the operation of a Federal statute against the dissemination of obscene matter by mail. *Harman* v. *United States*, 50 Fed. 921; *United States* v. *Journal Co.*, 197 Fed. 415; *Tyomies Publishing Co.* v. *United States*, 211 Fed. 385.

A statute under which an indictment is framed, charging the offense of mailing a newspaper containing an advertisement of a state lottery is not obnoxious to the First Amendment. *In re Rapier*, 143 U. S. 134; *Horner* v. *United States*, 143 U. S. 207, 213; *Same* v. *Same*, 143 U. S. 570.

As a condition for the privilege of entry of publications as second-class matter, Congress may require the furnishing of certain information with respect to ownership, etc., of publication. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288.

The Espionage Act of 1917 does not fall within the language of this Amendment. *Schenck* v. *United States*, 249 U. S. 47; *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616. See also *Frohwerk* v. *United States*, 249 U. S. 204.

The provisions of the Espionage Act denying the mails to newspapers violating its prohibitions do not violate the First Amendment. *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407.

Statutes requiring the procurement of a license for theatrical performances have been held not to violate this Amendment. *Commonwealth* v. *McGann*, 213 Mass. 213.

Freedom of speech is not abridged by prohibiting addresses in public parks. *Commonwealth* v. *Davis,* 162 Mass. 510.

A statute making it unlawful to distribute handbills upon the public streets does not abridge the freedom of the press. *In re Anderson,* 69 Nebraska, 686.

It is therefore quite clear that the freedom of the press, as guaranteed by the First Amendment, is subject to limitation by express enactments regulating its exercise. On this point the words of the Court in *Toledo Newspaper Company* v. *United States,* 247 U. S. 402, 419, and in *Gilbert* v. *Minnesota,* 254 U. S. 325, are conclusive. In the *Toledo case* the Court says (pp. 419–420):

> *The asserted inapplicability of the statute under the assumption that the publications complained of related to a matter of public concern and were safeguarded from being made the basis of contempt proceedings by the assuredly secured freedom of the press.* We might well pass the proposition by, because to state it is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. The safeguarding and fructification of free and constitutional institutions is the very basis

and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and can not be held to include the right virtually to destroy such institutions. It suffices to say that however complete is the right of the press to state public things and discuss them that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing. [Italics ours.]

In the *Gilbert case* the court says (p. 332):

The next contention is, that the statute is violative of the right of free speech, and therefore void. It is asserted that the right of free speech is a natural and inherent right, and that it, and the freedom of the press, were "regarded as among the most sacred and vital possessed by mankind, when this nation was born, when its constitution was framed and adopted." And the contention seems necessary for the plaintiff in error to support. But without so deciding or considering the freedom asserted as guaranteed by the Constitution of the United States or by the Constitution of the state, we pass immediately to the contention and for the purposes of this case may concede it, that is, *concede that the asserted freedom is natural and inherent, but it is not absolute, it is subject to restriction and limitation. And this we have decided* (citing *Schenck* v. *United States,* 249 U. S. 47, 52; *Frohwerk* v. *United States,* 249 U. S. 204, 206; *Debs* v. *United States,* 249 U. S. 211; *Abrams* v. *United*

States, 250 U. S. 616; *Schaeffer* v. *United States,* 251 U. S. 466).

From the foregoing it is clear that the freedom of the press never did and does not now include the absolute right to publish that which Congress has deemed it necessary and proper to forbid in the exercise of its constitutional powers.

The prevailing view in the United States is that the constitutional guaranty of a free press is directed against a system of license or censorship previous to publication and does not relate to immunity from punishment. (*Patterson* v. *Colorado,* supra.)

In opposition to this view it is often urged that the true interpretation of the First Amendment is to be found in the Kentucky Resolutions of November, 1798. (See Jefferson's letter to James Madison, November 17, 1798, containing draft of the Kentucky Resolutions, Vol. IV, Jefferson's Complete Works, p. 258, and the report written by Madison for the Virginia House of Delegates; see publication of Debates and Proceedings on the Virginia Resolutions of December 21, 1798, and the Virginia Reports of 1799 compiled by J. W. Randolph; see also Vol. 8, Ford's Writings of Jefferson, pp. 290, 309.) The substance of this position is that the security of the freedom of the press requires that it should be exempt not only from previous restraint but from legislative restraint also and that this extends not only to previous inspection by licensers but also from the subsequent penalty of the law.

With respect to this position, attention is directed to the fact that at the time of those writings there was presented to the people by equally eminent authorities, statements setting forth a different interpretation of the First Amendment and the interpretation subsequently adopted by the Supreme Court. For example, the House of Representatives on February 25, 1799, sitting as the Committee of Whole received the report of a Select Committee on the petition praying for a repeal of the Alien and Sedition laws. In this report the Committee declared *inter alia* that the liberty of the press consisted not in license for every man to publish what he pleased without being liable to punishment, but only permission to publish without previous restraint whatever he might think proper, being answerable to the public for any abuse of this permission. (See Annals of Cong., 5th Cong. 1797–1799, Vol. 3, pp. 2986, 2989.)

While it is true that a discussion of the meaning of the First Amendment was brought forth by the political controversy over the constitutionality of this old Sedition Act, it must constantly be borne in mind, in defining the scope of the First Amendment, that all of the discussion at that time, including those made in Jefferson's Kentucky Resolutions, and Madison's Report on the Virginia Resolutions, referred to above, were discussions made in the heat of the anti-Federalist Election campaign of 1798 and 1799. These Resolutions and Report, therefore, have distinctly the character of

partisan documents put forth in the heat of a bitter political contest.

Furthermore, it is to be noted that the report written by Madison was in reality an appeal to the people by the Majority of the Virginia House of Delegates. In this connection it must not be forgotten that the Minority of the Virginia House of Delegates also made a report at the same time, subsequently issued as an appeal to the people, in which was succinctly expressed the interpretation of the First Amendment contended for by the Government in the instant case. It is a historical fact, long lost sight of, that this so-called Minority report was actually written by John Marshall at that time a candidate for Congress and later Chief Justice of the Supreme Court of the United States. The circumstances which brought forth this Minority appeal, Marshall's authorship, and its contents, are fully described in Vol. II of Albert J. Beveridge's "The Life of John Marshall," pp. 401, 406. An original copy of this Minority document entitled "The Address of the Minority in the Virginia Legislature to the People of that State, containing a Vindication of the Constitutionality of the Alien and Sedition Laws," is to be found in the Library of Congress, catalogued "Class E 327, Book A 22."

Furthermore, the view of Marshall was that adopted subsequently by the Supreme Court and not the view of his distinguished political opponents.

Finally, that the First Amendment was designed to preserve for the United States certain existing and recognized constitutional liberties and not to create novel principles of law such as contended for by Jefferson and Madison is conclusively shown by the language of the court in *Brown* v. *Walker,* 161 U. S. 591, at page 600:

> As the object of the first eight amendments to the Constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and of the limitations that should be put upon them.

And, similarly, in *Robertson* v. *Baldwin,* 165 U. S. 275, at page 281, it is said:

> The law is perfectly well settled that the first ten amendments to the Constitution * * * were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors and which had from time immemorial been subject to certain well-recognized exceptions.

If, as held in *Toledo Newspaper Co.* v. *United States,* and the other cases cited, *supra,* punishment may constitutionally be meted out for interference with the administration of other governmental

powers, it is difficult to see why the administration of the taxing powers of Congress is not entitled to the same protection. Accordingly, it is submitted that Section 3167, R. S., as amended and embodied in Section 1018 of the Revenue Act of 1924, and so construed herein, being a legitimate exercise of the taxing power, is not antagonistic to the First Amendment.

CONCLUSION

The acts charged against the defendants in these cases clearly violate the provisions of Section 3167, R. S., as amended. That Section contravenes neither the First Amendment to the Constitution of the United States nor any other constitutional provision. We respectfully submit, therefore, that the judgments of the learned courts below in these cases should be reversed.

JAMES M. BECK,
Solicitor General.

APRIL, 1925.

○

No. 768.

In the Supreme Court of the United States

October Term, 1924.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

WALTER S. DICKEY and RALPH ELLIS,
Defendants in Error.

In Error to the District Court of the United States for the Western District of Missouri.

BRIEF FOR DEFENDANTS IN ERROR.

JAMES A. REED,
MAURICE H. WINGER,
DAVID M. PROCTOR,
Attorneys for Defendants.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

INDEX.

Cases Referred To.

In the Supreme Court of the United States

October Term, 1924.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

WALTER S. DICKEY and RALPH ELLIS,
Defendants in Error.

In Error to the District Court of the United States for the Western District of Missouri.

BRIEF FOR DEFENDANTS IN ERROR.

No. 768.

STATEMENT.

The defendant Walter S. Dickey, as the owner and editor, and Ralph Ellis, as managing and supervising editor, respectively, of the Kansas City Post, were indicted in six counts for publishing the names and amount of income taxes paid by certain individuals named in the counts of the

indictment. They were charged with having obtained the names of the taxpayers and the amount of income taxes paid by them from a list of income taxpayers, and amount paid by each, made available for inspection in the office of the Collector of Internal Revenue.

It is charged that this list was made available for inspection, but "not for the purpose of being printed or published in newspapers or public prints."

The defendants filed separate demurrers to each count of the indictment on the ground that the indictment was not sufficient in law for the following reasons:

(a) Because the statute, which the defendants were charged with violating, is inconsistent with the statute making income tax returns upon which the tax has been determined by the Commissioner of Internal Revenue public records, and inconsistent with the statute requiring the Commissioner of Internal Revenue to prepare and make available to public inspection lists containing the name and post office address of each person making an income tax return, together with the amount of income tax paid by such person.

(b) That a statute prohibiting the printing and publishing of that which had already been made available to public inspection is an abridgement of the right of free speech and freedom of the press in violation of the First Amendment to the Constitution of the United States.

(c) That the information published by the defendant was a public record, which had already

been lawfully published pursuant to the Revenue Act of 1924, and any statute forbidding or penalizing the publication of the same is in conflict with the First Amendment to the Constitution of the United States.

(d) The alleged crime attempted to have been charged is for the publication in Missouri of information already lawfully made public, and no power or authority to regulate, prohibit or penalize the publication of such information exists in the Government of the United States, all such power, if possessed by any government, being by the Tenth Amendment to the Constitution of the United States expressly reserved to the states or to the peoples thereof.

The demurrers were sustained by the learned trial judge, who handed down a written opinion, found on pages 31-34 of the record.

The following sections of the Revenue Act of 1924, in the order in which they appear, are involved:

> "Sec. 257, Sub-division (b): The commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal-revenue district and in such other places as he may determine, *lists containing the name and the post office address of each person making an income tax return in such district, together with the amount of the income tax paid by such person.*" (Italics ours.)

Sec. 1018, which re-enacts Sec. 3167 R. S.:

> "It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to *print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses or expenditures appearing in any income return;* and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment." (Italics ours.)

The first question for consideration is, Does the Revenue Act of 1924, taken as a whole, with particular reference to the two sections above quoted, prohibit the publication in newspapers of the "lists containing the name and the post office address of each person making an income tax

return in such district, together with the amount of the income tax paid by such person," after they have been made available to public inspection and in effect published by the Government itself?

The second question for consideration is, If the Revenue Act of 1924 does prohibit the publication of said lists, is it constitutional in that respect? This involves the First Amendment to the Constitution of the United States, providing that Congress shall make no law abridging the freedom of speech or of the press, and the Tenth Amendment to the Constitution, reserving all powers to the states and the peoples thereof not expressly granted to the Government.

I.

Defendants in error contend:

(a)

That from 1798 to 1870 the law not only permitted, but required full publicity of *tax returns*.

(b)

That in the laws of 1870 to 1894 such limitations as were put upon publication of returns applied only to tax assessors and their deputies.

(c)

That in 1894 the law for the first time attempted to prevent newspapers from publishing the *returns*, but that even this law permitted publication when "provided by law."

(d)

That the law of 1894 having so far as its income tax provisions were concerned been almost immediately declared to be unconstitutional, the provision relating to publicity of returns remained practically a dead letter until the Constitution was amended, and the law of 1913 enacted.

(e)

That the law of 1913 greatly enlarged the right of publicity:

(a) It declared the returns to be public records.

(b) It made them open to inspection by all persons on order of the President.

(c) It gave the state officers the right to inspect the returns without the permission of the President, and it placed no limitation upon publicity of facts ascertained by the state authorities.

(f)

That the law of 1918 further enlarged the right of publicity in two important particulars:

(a) It authorized stockholders to examine corporate returns, but imposed heavy penalties for publishing the facts thus learned.

(b) The law introduced an entirely new subject which did not relate to publicity of *returns,* but to the preparation by the Commissioner of *lists containing the names and addresses of taxpayers,* and the publication of such lists in the office of the Collector of Internal Revenue in each district, and in such other places as the Commissioner may determine.

And, that this law providing for the publication merely of lists of names and addresses stood upon the statute books for seven years, and was commonly treated as public property and used by the press without interference or prosecution.

(g)

(a) That in 1924 an effort was made in the House of Representatives to grant full publicity for all returns; that this contention was compromised in the House by providing that the committees of Congress could have access to the returns and the decisions made thereon, and could report the facts to Congress, without limitation upon publicity of facts gathered by the committees of Congress, or the proceedings of Congress relative thereto.

(b) That when the bill reached the Senate it was amended so as to provide full publicity of returns.

(c) That in conference the disputes between those who wanted secrecy and those who wanted absolutely publicity was compromised by *adding to the provision for the publication of lists of names and addresses of taxpayers,* a provision that *the amount of taxes paid should also be stated in the lists.*

(d) That the clear intention of Congress was to preserve secrecy as to the private information contained in the *returns,* but to give full publicity in the published *lists* to the names and addresses of the taxpayers and the amounts ultimately paid.

(h)

That the Federal Government cannot prepare a list of taxpayers, declare that list to be a public record, publish its contents to every person who cares to read and make it available to every person who cares to look at it, and then send a man to jail for talking or writing about that which the Government has already made public, and that the imposition of any such penalty is in violation of the First and Tenth Amendments to the Constitution of the United States.

A review of the law relating to publicity of tax returns may serve as an aid to construction of the particular statute upon which the indictment is founded.

EARLY TAX LEGISLATION.

In 1798, and at various times between that date and 1861, laws were passed levying direct taxes. All such laws provided for returns by the taxpayers showing in considerable detail their taxable property and its valuation.

The assessors were required to post written notices in public places in order to "advertise all persons concerned of the place where said lists, valuations and enumerations may be seen and examined * * *, the assesser * * * during fifteen days after the date of *public notification* [shall] submit the proceedings and the lists *to the inspection of any and all persons who shall apply for that purpose* * * *; and [shall] grant certified

copies to any person who shall pay the [regular] fees * * *; [and the lists] shall remain in the office of the Surveyor of Revenue, and [the lists] shall be open to the inspection of any person who may apply to inspect the same."

The Act of July 22, 1813, substantially incorporated the above provisions and declares that the lists *"after the public notification" shall remain with the principal assessor, and be open to the inspection of any person who may apply to inspect the same.*

The Act of 1815 contained substantially all of the above provisions, but also required:

> "That immediately after the valuations and enumerations shall have been completed * * * the assessor shall *by advertisement in some public newspaper,* and *by written notification posted,* et cetera, advertise all persons concerned of the place where said lists and valuations may be seen and examined. * * *"

(And they) "shall be open to the inspection of *any and all* persons who may apply to inspect the same," et cetera.

Act of July 9, 1798, Sections 16, 18, 19 and 27.
Act of July 14, 1798, Sections 5 and 6.
Act of July 22, 1813, Sections 13, 14, 16 and 17.
Act of Jan. 9, 1815, Sections 14, 21 and 22.

The Act of 1861 levied an *income* and other taxes. It incorporated the provisions of the laws above quoted.

And also that the "taxes, when so assessed and *made public* shall become a lien on the property, or other sources of income," of the taxpayer. (See p. 299; Sections 21, 22, 29, 31, 49 and 50.)

The Acts of July 1, 1862, and June 30, 1864, embrace in almost identical form the provisions heretofore quoted.

But to Section 38 of the Act of June 30, 1864, was added a proviso which is the first restriction upon publicity. It may be regarded as the genesis of R. S., Section 3167. It reads:

> "Provided: That if any officer shall divulge to any party, or make known in any manner other than is provided in this Act, the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, he shall be subject to the penalties prescribed in Section 36," etc.

It will be noted that the limitation only went to the extent of preventing an officer from disclosing information as to the operations, apparatus, etc., of a manufacturer, which he obtained while inspecting the plant for the purpose of listing the property for taxation.

There was no substantial change in the law until the Act of July 14, 1870. That Act repealed all taxes except income taxes, and a new clause was added as follows:

> "Provided: That no collector, deputy collector, assessor or assistant assessor shall *permit to be published* in any manner such

income returns, or any part thereof, except such general statistics, not specifying the names of individuals or firms, as he may make public, under such rules and regulations as the Commissioner of Internal Revenue shall prescribe."

The taxing provisions of the law of 1870 expired by limitation in 1872, and the above quoted proviso seems to have at least temporarily disappeared from the statutes.

August 27, 1894, what is commonly known as the Wilson Bill, afterwards declared unconstitutional, was passed. It was a combined tariff and revenue Act. It contains what is designated as R. S., Section 3167, as follows:

"That it shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in *any manner whatever not provided by law* to any person the operations, style of work or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return by any person or corporation, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof, to be *seen or examined* by any person *except as provided by law,* and that it shall be unlawful for any person to print or publish *in any manner whatever not provided by law,* any income return or any part thereof or the amount or source of income, profits, losses, or expendi-

> tures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States, he shall be dismissed from office and be incapable thereafter of holding any office under the Government."

Section 3167, as it then stood, was a composite of the proviso to Section 38, *supra,* that proviso being almost literally copied, and of the proviso to the law of 1870, *supra,* but modified so that in lieu of the clause which forbade the collector to *permit* to be *published* the income returns, is found a clause forbidding him to permit such returns to be *seen* or *examined* by any person, except as by law provided. And there was added, evidently for the purpose of rendering that provision effective, a clause making it unlawful for any person to *print* or *publish* any income return, or the amount or source of income, or profits, etc., appearing in any return.

In this law then for the first time we find publicity of any kind *except as provided by law* to be absolutely prohibited.

Summarizing, the statute forbade the collector from (a) disclosing the information he *obtained by visitation* of the premises; (b) from disclosing the amount or source of income, profits, losses, expenditures, or any particular disclosed in *any return;* (c) from permitting any *income return*

to be seen or examined by any person except as provided by law. And it was also declared by it to be unlawful for any person to print or publish in any manner not provided by law any *such return* or part thereof.

What has been said makes it plain that the original policy of publicity which had been consistently followed by the Government until 1870 was intended by the Act of 1894 to be reversed. But, even in this Act, three times repeated, is the phrase *"except as provided by law."*

The income tax provisions of that law were almost immediately declared to be unconstitutional. The remaining provisions of the law relating to tariff, etc., of course, stood. But there was no occasion to contest the new doctrine of secrecy of returns because no returns were necessary.

The doctrine of secrecy was, however, challenged at the first opportunity. The occasion came when the income tax law of 1913 was before Congress. While that carried over the old Section 3167 there was introduced **an entirely new section relating to the publicity of returns,** being Section 2, Subdivision "G," paragraph "d" of the Revenue Act of 1913, which is as follows:

> "When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the Commissioner of Internal Revenue and *shall constitute public records and be open to inspection as such:* Provided, That any and all such *returns* shall be open to inspection only upon the order of the Presi-

> dent, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President: Provided further, that *the proper officers* of any state imposing a general income tax may, upon the request of the governor thereof, *have access to said returns* or to an abstract thereof, *showing the name and income of each such corporation,* joint stock company, association or insurance company, at such times and in such manner as the Secretary of the Treasury may prescribe."

If the section as originally written had been passed, the records would have been public records and open to inspection as such. It was because Congress believed that any public record open to public inspection could be seen of all men and would become general, public property, that Congress thought it necessary to add the provisos restricting inspection. Accordingly, it limited the natural meaning of the words, "constitute public records and be open to inspection as such," by providing that the returns should only be open to inspection upon the order of the President.

But, regarding that restriction as too limited, it modified the restriction of the first proviso by a second proviso, which declared that *state officers shall "have access to said returns or to an abstract thereof showing the name and income of each such corporation."*

The fact that Congress deemed it necessary to limit the words, "shall constitute public records and be open to inspection as such," clearly demonstrates the sense in which Congress understood that

phrase. If the Congress had not believed that the term carried with it full and complete publicity, there would have been small occasion to have added the limitations contained in the first proviso. If it had not believed the first proviso to be too restricted, it would not have added a second proviso giving to state officers an absolute right of inspection.

In determining the meaning of a law, the prime rule of construction is that the courts shall get at the intention, purpose and understanding of the legislative body. The court must, if possible, find the sense in which the legislative body employed particular phrases. We submit that the action of Congress just referred to shows that Congress construed the phrase, "shall constitute public records and be open to inspection as such," while standing alone and unrestricted, to have granted absolute publicity.

It is worthy of consideration that Congress recognized the fact that publicity might be desirable. Accordingly it lodged the power in the President to issue an order making all of the returns public and, as said, gave to proper state officers a full right of inspection of returns of corporations.

The right granted to officers of a state to make examination of corporate returns made almost inevitable publicity in the press.

For *there is no word in the law declaring that the information thus gained by the state authorities shall be kept secret.* Indeed, to have imposed

such a restriction would have defeated an effective utilization of the information.

If the governor's agents learned the facts, they would be of no use unless disclosed to the governor. Likewise they would be of small use to the governor unless he could lay them before the taxing authorities of the state, and of the various counties and municipalities. In all human likelihood it would be not only desirable but necessary to submit them to the legislators for their consideration in the enactment of laws relating to taxation. Indeed, the proviso bears upon its face the evidence that Congress had in view these very purposes and uses.

The facts obtained and employed as above indicated would necessarily be common, public property. They would undoubtedly be given to the winds and of course be commented upon by the public press.

If it be contended that this construction entirely nullifies the provision limiting publication, we answer that there was still a limitation, at least as to general publication of *all returns*. For, the right of the state was restricted to the examination of corporate returns. But, however illogical the two provisions may be, there they stand as perhaps another evidence of that congressional ineptitude which is usually inseparable from haste.

It is, however, evident the door of publicity closed by the law of 1894 was upon the first opportunity being pried open by the opponents to secrecy in the public business.

The resistance to secrecy in the public business was again manifested in the Act of 1918. That law re-enacts Section I, subdivision G, paragraph (d), of the Revenue Act of 1913, as Section 257, but there is added a third proviso as follows:

> "All *bona fide* stockholders of record owning 1 percentum or more of the outstanding stock of any corporation shall, upon making request of the Commissioner, be allowed to examine the annual income returns of such corporation and its subsidiaries."

It, however, declared that:

> "Any stockholder who pursuant to the provisions of this section is allowed to examine the return of any corporation, and who makes known in any manner whatever not provided by law the amount or source of income, profits, losses, expenditures, or any particular thereof * * * shall be guilty of a misdemeanor," etc.

Up to this point we have been discussing the laws relating to publicity of tax returns, and have shown that there was: First, absolute publicity; then, absolute secrecy; and then, a limited publicity of returns; and that this limited publicity of returns had been enlarged by the laws of 1913 and 1918.

We now invite attention to the fact that the law of 1918 for the first time introduced an entirely new subject matter, which related not to the *publicity of returns*, but to the *publicity of lists* which merely contained the *name of* the *taxpayer and his address*. This new provision reads:

> "The Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal revenue district and in such other places as he may determine, *lists* containing the *names* and *post office addresses* of *all individuals* making income tax returns in such district."

The law as it then stood provided: (1) that the *returns* should constitute public records; (2) that although public records they should not be open to public inspection except by order of the President, who could make them all public if he so desired; but, (3) that the proper officers of a state could examine *returns* of all corporations without Presidential permission; (4) that *bona fide* stockholders could *without* Presidential permission examine returns; (5) *The Commissioner was commanded to prepare for public inspection and exhibit in the offices of the collectors of internal revenue districts and in such other places as he saw fit, lists containing the names and post office addresses of all individuals making income tax returns.*

It will be noticed that:

There is no penalty provided in this section for any use any person might make of information gained under order of the President.

There is no penalty imposed upon any officer of a state or other person for making public the information gained by a state officer. He could transmit it to whomsoever he pleased.

There is no penalty upon or prohibition against any person examining the lists containing the names and post office addresses of persons making income tax returns.

On the contrary, the provision for the preparation and inspection of lists containing the names of taxpayers is utterly useless and senseless unless it was intended by such publication to let the public generally know *the names* and *addresses* of the *income-tax payers.*

In sharp contradistinction with the other provisions of the act, which contained neither prohibitions nor penalties, is found a severe penalty to be visited upon the *individual stockholder who discloses the amount or source of income, profits, losses* or *expenditures* of the particular corporation whose return he is permitted to examine.

Congress having, therefore, provided for certain kinds of inspection, disclosure and publicity without having affixed any prohibitions or penalties, and in the same section having fixed a prohibition and penalty for disclosure by one particular class of persons, the natural and logical conclusion is that Congress intended to exempt all

the other persons named from either prohibition or penalty.

It appears, therefore, that the door, once completely closed by the Act of 1894 and partially opened by the Act of 1913, was in the Act of 1918 further prized open, this time far enough to permit stockholders to see the *returns* and to *compel* the *Commissioner to hang outside where all could see a complete list of taxpayers with their addresses.*

Reading the provisions of Section 257 granting these exemptions and privileges with Section 3167, there is found no conflict whatsoever because Section 3167 only levels its prohibitions against making known the *returns "in any manner not provided by law"* or *"printing or publishing the returns in any manner not provided by law."* The language of Section 3167, as has been said, had been in the law for a long time. But, when Congress enlarged the degree of publicity of *returns* and by law provided that lists of taxpayers and their addresses should be kept open to public inspection, the rights thus granted *"were provided by law,"* and hence were excepted from the prohibitions of Section 3167. And what is here said applies equally to Section 257 as amended in 1924.

We have hitherto commented upon the prohibitions and limitations on the publication of *returns* or *their contents.* But, as heretofore stated, "the Act of 1918," passed February 24, 1919, while still dealing with prohibitions and limitations relating to the *returns,* introduced an *entirely new*

proposition not dealing with the *returns or their contents* but with a separate and distinct subject, to-wit: *the publication of lists* containing the *names and post office addresses of all individuals* making tax returns in each district.

Many arguments have been advanced to sustain the doctrine that income tax returns should be kept secret, among which is the claim shadowed forth in the government brief that a taxpayer, knowing the amount and source of his income may be declared, will be thereby induced to make a false return.

The argument is unsound, the very converse being the case. A dishonest taxpayer making a secret return may hope to deceive the collector, but if he understands that the amount of his tax will be known to his business associates and to the public, he is very likely to fear discovery and prosecution.

Accordingly, it was deemed proper to publish the *amount* of the tax, but not to give the details of the taxpayer's business, as shown by his return.

But, whichever argument is sound, the Congress in 1918 took the latter view. Accordingly, Congress by law commanded the Commissioner to prepare lists containing merely the names and addresses of income-tax payers, and further commanded him to make these lists available to public inspection in his office.

It also further provided that the lists should be *exhibited in such other places in the district as the Commissioner might determine.*

Under that provision the Commissioner may, if he sees fit, post the lists in hundreds or even in thousands of public places. He may make them "available to public inspection" by printing them in all newspapers of each district. If he should exercise that discretion, who would claim he thereby violated the law, or that a newspaper could be penalized for publishing that which the Commissioner requested should be published?

The fact seems to stand out, and be unanswerable, that Congress determined to make an entirely different rule with reference to the publication of the *lists of names* and *post office addresses* than it had theretofore made, and still continued to make, with reference to the *contents of returns.*

It is worthy of note also that these lists or abstracts from them were for more than seven (7) years not only open to public inspection, but were made use of generally by the press of the land without challenge by any authority and without, so far as we have been able to learn, a single complaint or prosecution having been lodged.

This brings us to a consideration of the Act of June 2, 1924.

This law amended Section 257 of the Act of 1918 in two particulars. It provided, first, that the committees of the House and Senate "shall have the right to call on the Secretary of the Treasury," personally or by its examiners or agents, "for any data of any character contained in or shown by the returns," and that "any relevant or useful information thus obtained might be submitted" to either House of Congress.

We remark in passing that this, of course, provided for the fullest publicity of all matters investigated by committees of Congress, particularly if reported to either House, for in that event the proceedings being public are not only published in the Congressional Record, which is sent broadcast throughout the land, but such proceedings are generally commented upon by the press of the world.

It would require a bold man indeed to say that information thus gained and made known could not be used by the press. And yet if the contention of the government that Section 3167 prohibits all *publication* by *newspapers* is true, it would apply in the case just cited exactly as it would apply if the newspaper gained the information from the *lists* prepared by the Commissioner and exposed to public view as required by law.

The second particular in which Congress in the Act of 1924 amended the Act of 1918 is of such vital interest that we venture to quote from the proceedings of Congress leading up to its enactment. The bill, of course, originated in the House. When it reached the Senate, Clause "b" of Section 257 was an exact copy of the Act of 1918. At the risk of prolixity we again quote it:

> "Section 257 (b). The Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal revenue district and in such other places as he may determine, lists containing the *names* and *the post office addresses* of all individuals making income-tax returns in such district."

It will be noticed that the publication was limited to the *names* and *addresses*. It did not provide for publication of *the amount of tax paid.*

But, the bill as finally passed added at the end of the language just quoted the following clause: *"together with the amount of income tax paid by such person."* How this clause came to be added and what Congress intended to accomplish by such addition of the words seems to warrant an exposition of the proceedings in Congress.

Early in the first session of the 68th Congress, Representative Frear introduced H. R. 4815 to amend Section 257. On the same day Representative Beck introduced H. R. 4833 for a similar purpose. Both were publicity bills but neither was acted on, probably because the House Ways and Means Committee was then engaged in drafting the general Revenue bill, which later became the Act of 1924.

(See Congressional Record, Vol. 65, pages 678-9.)

When that bill came before the House, Representative Frear sought to amend it by striking out all of Section 257 and inserting in lieu thereof, "that * * * the returns, together with any corrections thereof, * * *, shall be filed in the Treasury Department and shall constitute public records and be open to inspection as such under the same rules and regulations that govern inspection of other public records."

The Frear amendment was defeated 158 to 80.

(See Congressional Record, Vol. 65, p. 2512.)

However, after some discussion an amendment was offered inserting in paragraph (a) of Section 257 after the word "President," the following: "Provided that the Committee on Ways and Means of the House of Representatives or the Committee on Finance of the Senate or a special Committee of the Senate or House shall have the right to call on the Secretary of the Treasury for and it shall be his duty to furnish any data of any character contained in or shown by the returns or any of them that might be required by the Committee and any such Committee shall have the right, acting directly as a committee or by or through such examiners or agents as it may designate or appoint, to inspect all and any of the returns at such times and in such manner as it may determine and any relevant or useful information thus obtained may be submitted by the Committee obtaining it to the Senate or House or to both the Senate and House as the case may be."

The amendment was adopted by a vote of 158 to 100.

(See Congressional Record, Vol. 65, p. 2964.)

Thereupon an amendment was offered for the purpose of restricting the publicity which might be given through a report of Committees to Congress and of preventing disclosure by the Committees to Congress.

This amendment was rejected by a vote of 134 to 104.

(See Congressional Record, Vol. 65, p. 2964.)

This tendered amendment and its rejection is significant as it plainly shows that Congress intended that any information obtained by a Committee should be made available to the public in the fullest sense, for the Members of Congress, of course, knew that facts reported to the Congress were considered in public and were immediately subject to comment by the press.

The bill passed the House and was sent to the Senate with Section 257 in the form above stated.

Senator Norris sought to amend the bill so that paragraph (b) of Section 257 would read:

> "Returns upon which the tax has been determined by the Commissioner shall constitute public records and shall be open to examination and inspection as other public records, under the same rules and regulations as may govern the examination of public documents generally."
>
> (See Congressional Record, Vol. 65, p. 7676.)

The amendment was adopted, yeas 48, nays 27.

Senator McKellar thereupon offered an amendment following the Norris amendment, "all claims for abatement or refunds of taxes shall likewise be public property, subject to inspection under similar rules."

The amendment was adopted, yeas 47, nays 26.

(See Congressional Record, Vol. 65, p. 7693.)

In this shape the bill passed the Senate, was returned to the House of Representatives and went to conference.

The House language of Section 257 having been stricken out by the Norris amendment, that amendment, which provided publicity of *returns,* became the language of the section. But, the conferees, while rejecting the text of the Norris amendment, inserted in lieu of it at the end of Section 257 the words, "together with the amount of the income tax paid by such person." This action was undoubtedly the result of compromise, it being deemed by the conferees that further publicity should be given but that it should be limited to *the lists of taxpayers* enlarged by a statement of the *amount of taxes paid.*

In this form the conferees reported the bill to their respective bodies.

(For Conference Report in full, see Congressional Record, Volume 65, pages 9243-9247.)

In presenting the conference report, Senator Smoot, the chairman, stated:

> "The House bill provided that the income tax *returns* should be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary of the Treasury and approved by the President, with special provisions for the inspection of returns by and the furnishing of information to the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, a special committee

> of the Senate or House, the proper officers of any state, and the *bona fide* shareholders of record of a corporation. The Senate amendment provided that *returns upon which the tax has been determined by the Commissioner shall constitute public records* and shall be open to examination and inspection as other public records. *On this point the House recedes with an amendment* restoring the provisions of the House bill with certain clerical changes and providing in addition that the Commissioner shall have prepared and made available *to public inspection* in the office of the Collector in each internal revenue district and in such other places as he may determine lists containing the name and post office address of each person making an income-tax return in such district, *together with the amount of tax paid by such person.*"

In the debate in the Senate on the conference report, the following occurred between Senator Copeland and Senator Jones (N. Mex.), one of the conferees and an ardent advocate of full publicity and who voted for both the Norris and the McKellar amendments (Cong. Rec., Vol. 65, pp. 7692-3):

> *Senator Copeland:* I not only voted for the publicity feature, * * * but spoke for it. I would like to ask the Senator from New Mexico if the conferees succeeded in adding some features to this publicity provision as it came from the House? In other words, is the publicity feature in the bill as finally agreed upon an improvement on the House provision?

Mr. Jones of New Mexico: There is no question about that. The bill as it passed the House contained no provision regarding the publicity of proceedings in the Treasury Department in the adjustment of claims between the Government and the taxpayers.

The bill as it came from the House did contain the provision that committees of the Senate and the House, and joint committees should have access to these returns. To that provision was added, in the Senate and in conference, this further feature, that, whereas under existing law the *names and addresses of taxpayers* in the several collection districts are published by posting a notice in the post office at the county seat of each county in the district, *under this provision the amount of the taxes paid by the taxpayer is also posted. But, of course, it gives no information as to the sources from which the incomes are derived.*

Mr. Copeland: But the Senate conferees did succeed in improving the House provision, at least to the extent named?

Mr. Jones of New Mexico: We improved it to that extent. *To my mind that was a very substantial improvement.*

(Cong. Rec., Vol. 65, pp. 9407-8.)

During the debates on the conference report in the House of Representatives, many references were made to the publicity section of the law which conclusively show the interpretation placed on the language by members of the House.

Mr. Treadway, one of the conferees, said among other things:

> "In my opinion the House bill offered as much opportunity for publicity of returns as was consistent with furnishing information to those having right of access. *The Senate amendment made the lists absolutely public property. The House conferees agreed to an amendment to their provision whereby the amount of the income tax paid should be included on the published lists.* * * *. *However, in order to secure an agreement with the Senate it was necessary to add the provision whereby the total amount of individual tax reported should be made public.* This is not a serious drawback, and *it will not convey information beyond the scope of what may be rightfully known.*"

Mr. Hawley, one of the conferees, among other things said:

> "I hope no member of the House will *be misled concerning the publication of the amount of money paid by any taxpayer.* Under the present law the collector posts in his office a list of the *names* and *addresses* and amounts of refunds paid, and also the *names* and *addresses* of those who pay taxes. *We added one additional thing,* so that he will post in his office the *taxes paid by each taxpayer as well as the refunds made.* It was *that or all the records of the government would be open to the widest investigation and publicity, so that every return would be open to those who desired to learn the business methods and plans of any taxpayer.* Such inspection would not affect beneficially the collector of taxes, but would prove a source of serious injury."

Mr. Frear, also one of the conferees, in the course of his remarks on the publicity section of the law, said:

> "It will enable every Member on the floor of this House to know what influence is behind propositions when a Member proposes an amendment here or passes his judgment upon an income tax bill. The *public will see his personal interest,* and they will discover quickly from the record whether his *personal interest* reaches $100,000 or $1,000,000, or whatever the amount may be, *or whether his interest is purely in behalf of the taxpayers of the country.*"

Mr. Hill, among other things, said:

> "I want to watch the faces of the Members of this House when next year the list of your personal *incomes is published.*
>
> *Already newspapers are preparing to publish the pittances we pay to the government as income-tax returns.*"

Mr. Tilson, among other things, said:

> *"I consider the publicity feature a very serious matter.* It cannot be defended on any ground of public interest. It is an unwarranted, entirely unnecessary *violation of the right of privacy in private affairs,* the rights of the public being fully protected by the Treasury Department under the present laws. It is *more than this; it will be a constant menace to the peace of the community and to the security and safety of the people.* While serving no useful purpose whatever, it will

lend convenient aid to the tongue of the meddlesome busybody, the pen of the blackmailer, and to the hand of the kidnapper."

(Cong. Rec., Vol. 65, pp. 9542-3-4-5.)

We apologize for the length of the above quotations, but feel that they are justified, as they disclose the conflict between the two Houses of Congress; the Senate contending for *full publicity of all returns*—a considerable minority in the House likewise so contending; the majority of the House, however, favoring the enlargement of the right to see the returns only as far as to permit Committees of Congress to make examinations and report the facts to Congress.

The differences between the two Houses were compromised by the Senate in part yielding to the House its contention that there should be only limited *publicity of the returns,* and the House yielding to the Senate so far as to give *full publicity* to the *amount paid by each taxpayer.*

Clearly, this was the understanding and purpose of Congress when it accepted the conference report.

PUBLICITY OF ALL TAX CONTROVERSIES APPEALED.

In considering the claim of the Government that Congress by the existing law intended to keep inviolate all the information contained in returns, and particularly to prevent printing or publication of such information, it is interesting to note that

Congress specifically provided for publicity of tax appeals.

Title IX creates a Board of Tax Appeals, and provides for appeals to the Board from assessments of additional taxes, adverse rulings on claims for abatement, assessments of additional estate taxes, etc. (See Sections 273, 274, 279, 308, 312.)

Section 900 provides that hearings on all appeals before the Board and its divisions shall be open to the public.

The Board is required to report in writing its findings of fact and decisions. * * *

> "All reports of the Board and its divisions, all evidence received by the Board and its divisions * * * *shall be public records open to the inspection of the public.* The Board shall provide for the publication of its reports. * * * Such authorized reports shall be competent evidence in all * * * courts, and shall be open to sale upon the same terms as other public documents."

If publication in a newspaper of any part of the lists be a crime, then publication by word of mouth is equally a crime.

The language of the statute is: "It shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, etc."

Publication may as well be by word of mouth, or by letter, or by telegram, as by newspaper. If the Government's contention then be correct, everybody in the world can go to the collector's office

and look at the list showing the income tax of everybody else. But, if any one of them mentions the amount of tax John Doe has paid, or even the fact that John Doe is a taxpayer, the person so guilty of talking can be sent to jail. Or, if a man were to write a letter mentioning that John Doe paid an income tax, even though the amount were not stated, he would likewise be liable to be sent to jail.

The lists might be exposed in the post offices, as indeed they were, and become the subject of neighborhood gossip. Yet, every man who dared to disclose any fact contained in the lists would be a law breaker. Thus, liberty of speech as well as of the press would be denied, and the very purpose which animated Congress in making the lists public would be defeated.

It is claimed that the publication of the lists interferes with the government in the collection of its taxes.

The answer is that the tax has already been collected before the lists are made. The transaction is closed.

The argument that the printing in a newspaper of the fact that John Doe is a taxpayer, and the amount of the tax he has paid, will interfere with the collection of his future taxes, seems to us utterly chimerical.

It presumes that the taxpayer of one year will be a taxpayer of the next—that he will be frightened by the newspaper publication; that he will,

therefore, be willing to falsify his future return; that the Government will not detect his falsehood and bring him to book—all these various presumptions, piled one on top of the other, are to be indulged, because a newspaper has printed that which the Government has already published and opened to the inspection of the world.

This patent absurdity the Government must justify, or its case falls.

Again, the language of the statute is that the collector or his deputies shall not "make known in any manner whatever not provided by law" anything learned by visitation, or "disclosed in any return." And, he is forbidden to permit the returns, or any abstract or particular thereof, "to be seen or examined, except as by law provided."

Will it be contended that although the law directed the collector to make the list, that his list is an "abstract or particular" taken from the return, and that the collector should, therefore, be sent to jail, although the law commands him to post such lists in his office?

Without further argument upon this phase of the case, we respectfully submit that it was the clear purpose of Congress to give to the public and the press generally the information contained in the *tax lists,* and that publication of these lists was intended to be excepted from the inhibitions of Section 3167, if, indeed, they were ever included within such inhibitions.

THE AMOUNT OF TAX PAID IS NOT PART OF THE RETURN.

The Government vigorously argues that the names and addresses of the taxpayers and the amount of tax paid, as shown upon the published lists, "must be taken from the returns" and "are a part of the return," and hence, that their publication is prohibited by Section 3167.

It is true that when the taxpayer makes a return, if correctly filled out, it necessarily contains his name and address. And, it would be quite natural for the Commissioner in making up the lists to go to the returns for the list of names. But, if he did not go elsewhere, his list of those who actually paid taxes would be far from accurate: First, because many persons who make return may never pay any taxes; second, because many persons are compelled to pay taxes who have never made a return.

But, while the names and addresses may be largely ascertained from the returns and a very incomplete and inaccurate list of such names made therefrom, the taxes actually paid can never under any circumstances be ascertained from the returns.

Bear in mind that the law does not require that the lists shall contain the names of the taxpayers and the amount of the taxes he admits he should thereafter pay, but requires that the lists shall show the amount of taxes actually paid.

When the returns are made they do not show the amount of the *tax paid,* because the tax has not yet been paid. Neither do they necessarily

show the correct amount of tax *to be paid,* because the amount of tax to be paid as stated in the return may differ widely from the amount of tax which is afterwards actually paid.

The ascertainment of the true amount of tax and the payment of the tax are both acts subsequent to the return. All that the return shows is the amount of taxable income admitted, and the taxpayer's estimate of what he thinks he ought *thereafter* to pay.

But, when the return has been filed, several things remain to be done:

1. It must be checked in the collector's office.

2. The taxpayer may have omitted to correctly state his amount of income, and the facts may be ascertained by the collector *aliunde* the return.

3. The taxpayer may have figured exemptions where not allowed, or charged himself with income not taxable; or figured his tax at a wrong rate; or made mistakes in his calculations—all of these problems must be gone over in the collector's office.

4. The taxpayer may decline to pay the tax the collector finds to be due. The controversy may be appealed, and the amount ascertained on appeal may not be determined for years, and when determined may radically differ from both the return of the taxpayer and the finding of the collector.

5. The tax as thus ascertained may then be paid in full; may be only paid in part; and it may never be paid. And the amounts that have been actually paid may be rebated so that the net amount

paid may radically differ from the amount paid in the first instance.

6. The tax may not be paid when due, in which case interest is added, thus increasing the amount the taxpayer must pay.

7. The tax may not be actually paid for years after the date on which the return is due and filed. Indeed, provision is made:

(a) For extension of time of payment;

(b) For credits of overpayments on future taxes;

(c) For extension of time by the collector where no tax return is made;

(d) For collection of deficiencies between the return and the amount ascertained to be due;

(e) Statutes of limitation are provided by which the Government may reopen these cases in periods varying from one to five years;

All of which appears by Sections 223, 224, 225, 271, 272, 273, 276, 277, 278, 306, 307, 309, 310, 311, 313, 502, 603, 604, 1003, 1009 and 1200.

And, finally Section 1202 provides that "any taxpayer * * * shall be entitled to an allowance by credit or refund of 25 per centum of the amount *shown as the tax upon his return.* If the correct amount of tax for such period is determined to be in excess of the amount *shown as the tax upon the return,* the taxpayer shall be entitled to the benefits of sub-division 'F' of Section 1200," which in like manner gives the taxpayer a reduction of 25 per centum.

Section 1202, *supra*, was passed after the taxes payable in 1924 were assessed, and after there had been payments by certain taxpayers. It follows:

(a) That if any taxpayer had made a return, and actually paid his tax, he would have been entitled to, and would have actually received back 25% of the amount paid by him. So, that if the amount he paid in the first instance had been stated in the return, it would have been inaccurate, because it was not the amount he in the final ascertainment contributed to the Government.

(b) As to those who had not paid prior to the enactment of Section 1202, in every instance their returns, if correctly made, would have shown an amount 25% greater than the amount they actually thereafter paid, or were required to pay; and the list of taxes printed from the returns would in every instance have been wrong. And this applies here, for the list we are indicted for publishing is the tax payable in 1924.

Is it not plain, therefore, that the lists of taxes actually paid could never be made, even with approximate accuracy, or the law requiring publication of lists of taxes paid have been substantially complied with, unless the Government should wait until the taxes were actually collected, and then from its books showing the payments that were made, have prepared correct lists of taxpayers, their addresses, and the amounts by them actually paid?

II.

LIBERTY OF THE PRESS.

"Congress shall make no law * * * abridging the freedom of speech or of the press."—First Amendment, Constitution of the United States.

"The Liberty of the Press—it is as the air we breathe, if we have it not, we die."
—Old Political Toast.

"The Press is the mistress of intelligence, and intelligence is mistress of the world."
—Benjamin Constant.

"Give me the liberty to know, to alter, to argue freely, according to conscience, above all liberties."
—Milton.

"The American people cannot be too careful in guarding the freedom of speech and of the press against any curtailment as to the discussion of public affairs and the character and conduct of public men."—Carl Schurz.

"A government had better go to the very extreme of toleration than to do aught that could be construed into an interference with or jeopardize in any degree the rights of the people."
—Abraham Lincoln.

"Give me but the Liberty of the Press, and I will give to the minister a venal House of Peers — I will give him a corrupt and servile House of Commons — I will give him the full sway of the patronage of office — I will give him the whole

host of ministerial influence — I will give him all the power that place can confer upon him to purchase up submission and overawe resistance — and yet, armed with the Liberty of the Press, I will go forth to meet him undismayed — I will attack the mighty fabric he has reared with that mightier engine — I will shake down from its height corruption, and bury it amidst the ruins of the abuses it was meant to shelter."—Sheridan.

"The freedom of the press should be inviolate."
—J. Q. Adams.

"The liberty of the press is the highest safeguard to all free government."—Baker.

"Speech ought to be completely free. The press ought to be completely free, * * * I have never heard of any danger arising to a free state from the freedom of the press or freedom of speech; so far from it I am perfectly clear, that a free state cannot exist without both. *It is not the law that is to be found in books that constitutes—that has consituted, the true principle of freedom in any country at any time.* No, it is the energy, the boldness of a man's mind which prompts him to speak not in private, but in large and popular assemblies, that constitutes, that creates in a state the spirit of freedom. This is the principle that gives life to liberty; without it the human character is a stranger to freedom. * * * Take away the freedom of speech or of writing, and the foundation of all freedom is gone."
—Rt. Hon. C. J. Fox.

"The press, its liberties, and the liberties of the people must stand or fall together."—David Hume.

"A free and unlicensed press in the just and legal sense of the expression, has led to all the blessings of religion and government which Great Britain enjoys." * * *

"Other liberties are held under governments but the liberty of opinion keeps governments themselves in due subjection to their duties."—Lord Erskine.

"I would rather live in a country with newspapers and without government than in a country with government and without newspapers."

—Thomas Jefferson.

"The right of a man to express his opinion in speech or print is justly esteemed as one of the most sacred prerogatives of a free people."—Justice Brown of the Supreme Court of the United States before the New York Bar Association.

"The sun might as easily be spared from the universe as free speech from the liberal institutions of society."—Socrates.

The language of the First Amendment is, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press * * *."

The government states: "This provision clearly refers to the law prior to the adoption of the constitution and intends to fix the liberty of the press

by that law. What such liberty was at the time of the adoption of the constitution, that it shall continue to be, no more, no less."

The authority quoted for the rule is the report of the House of Representatives on the Alien and Sedition Law. We confess to a little surprise that the opinion of the sponsors for that infamous law which the authorities never dared but once to enforce and which the people of the United States indignantly and instantly repudiated, should be quoted an authority on constitutional liberty.

The government proceeds: *"Under the common law the freedom of speech and of the press was strictly circumscribed. To publish a book or paper without the consent of censors was a crime."*

Again the government quotes with approval: "Freedom of speech or of the press is the right to publish what one chooses, so long as one does not *violate a law."*

And again, "There is no authority for the conclusion that the First Amendment restricts the powers of Congress to declare criminal and provide punishment for the publication of matters which interfere with the exercise of any of its constitutional powers."

Boiled down then, the contention of the government is that as to liberty of speech and of the press, we gained nothing by the Revolution, by the adoption of the Constitution, or by the enactment of the First Amendment. We stand as to those matters exactly where the British subjects of George III stood on the 4th day of July, 1776. If that contention be true, then the Revolution was

a failure and the adoption of the Constitution was a solemn farce.

We dissent entirely from that view. We submit:

(1) That all powers not granted to the Federal Government were reserved to the states and the peoples thereof;

(2) That the First Amendment is not a grant of power but is the negation of power.

Probably if it had never been enacted, power to establish a religion or circumscribe the liberty of speech and of the press would not have existed in the Federal Government, but would have remained as a reserve power of the states. Such indeed was the view of Hamilton, Pinckney, Sherman, Wilson and others, The Federalist No. 84, Dawson on Liberty of the Press 60, History of Congressional Debates by Gage 436.

However, Jefferson and his conferees sought to place the question beyond all dispute by the declaration that Congress shall make no law respecting an establishment of religion; it shall make no law prohibiting the free exercise thereof; it shall make no law abridging freedom of speech or of the press.

(1) It cannot be soundly argued that because the language is "Congress shall make no law abridging freedom of the press," that an inference is to be drawn that Congress can make any law it chooses touching the press so long as it does not "abridge" the liberties of the press as *they existed* in England when the Constitution was adopted. For that leaves out of consideration

the fact that Congress never was given any power whatsoever to pass laws controlling or regulating the press. That jurisdiction was never conferred, but, as said, if it existed anywhere, was reserved to the states.

(2) Neither can it be soundly contended that because the Constitution granted to the Federal Government certain express powers that Congress may in the furtherance of those powers take over to itself a power expressly denied to it by the First and Tenth Amendments and assert that whatsoever tends to interfere with or obstruct the government may be regulated or prohibited and that Congress is the sole judge as to such interference.

For, the foregoing doctrines coupled together mean this:

(a) That as to freedom of speech, of the press and of religion, we gained by the Revolution no rights save those which the British subject theretofore had and retained; and

(b) That those powers asserted by the British Government over the press of Great Britain may now be asserted by the Congress over the press of the United States.

This would bring us to the position:

(1) That press censors can be appointed for they were appointed and existed in England for many years; and

(2) The press can by congressional edict be prohibited from printing any criticisms of the government or printing the proceedings of Congress, or any comment thereon.

Such indeed was the practice in England for many years prior to the Revolution, a practice which was bottomed upon Parliamentary acts and the decisions of Crown-appointed judges, who held that the truth of a statement regarding acts of the government could not be given in evidence and that the greater the truth, the greater the libel. Indeed, it is the theory of the law of England today that Parliamentary debates are privileged and not subject to publication. But, any government of Great Britain daring to enforce that abominable theory would not live an hour.

We contend:

(1) That the right to impose censorship and punish for the printing of the truth, which had been practiced in England, was there from the very first contested and was never conceded; but that it nevertheless continued to be practiced and constituted one of the most arbitrary and offensive weapons of despotism. Nevertheless for many years prior to the American Revolution the British press boldly defied the government and compelled it to a practical surrender to public opinion.

(2) That prior to the Revolution similar restrictions and punishments had been imposed on the press of the Colonies, and that one of the prime objects of the Revolution was to gain for American citizens complete and absolute freedom of the press.

(3) That the freedom of the citizen is inseparable from freedom of conscience, of speech, of the press, and the right of peaceable assemblage. These are in fact but variations of one great nat-

ural right, inherent in man and inseparable from liberty. For, he who cannot think is but a beast. He who thinks and is forbidden to speak is but a slave. If he be permitted to speak, then he must speak to somebody, hence the right of assemblage and discussion. The right to write and to print is but an extension of the right of speech for it is only another means of communicating ideas by words. It is impossible to form any concept of liberty which does not embrace these great natural rights.

They were covered by the language of the Declaration of Independence, "All men are endowed by their Creator with certain inalienable rights. Among these are life, liberty and the pursuit of happiness. * * * Whenever any form of government becomes destructive of these ends it is the right of the people to alter or abolish it."

The Constitution was adopted "to secure the blessings of liberty," and the Bill of Rights was adopted to buttress and perfect the Constitution by expressly limiting the powers of the Federal Government.

It is mockery to say that at the end of the Revolution and the adoption of the Constitution and the Bill of Rights the people had reserved to themselves no greater liberties than were permitted by the government of Great Britain against which they had rebelled.

The radical difference between the government of King George and that established in the United States made impossible the application of the same rules to the press in America as in England.

There the Crown had primarily claimed to be the source of all power, and still asserted many royal prerogatives, one of these prerogatives being the right of the King to license the press.

But, in the United States the people are the source of all power. This doctrine was clearly announced in the report to the Virginia House of Delegates on the Alien and Sedition Laws, that report, in fact, being written by James Madison.

Mr. Madison said:

> "In the attempts to vindicate the 'sedition act,' it has been contended: (1) That the 'freedom of the press' is to be determined by the meaning of these terms in the common law. (2) That the article supposes the power over the press to be in Congress and prohibits them only from abridging the freedom allowed to it by the common law."

Singularly enough, after enjoying 127 years of complete liberty of the press, we now find dragged from its grave and presented here the identical argument in almost the identical phraseology employed by those who defended the Alien and Sedition Laws.

The doctrine is unsound now. It was unsound then, as Mr. Madison proceeded to demonstrate. He further said:

> "Although it will be shown, in examining the second of these positions, that the amendment is a denial to Congress of all power over the press, it may not be useless to make the following observations on the first of them.

It is deemed to be a sound opinion that the sedition act, in its definition of some of the crimes created, is an abridgment of the freedom of publication, recognized by principles of the common law in England.

The freedom of press under the common law is, in the defenses of the sedition act, *made to consist in an exemption from all previous restraint on printed publications by persons authorized to inspect and prohibit them. It appears to the committee that this idea of the freedom of the press can never be admitted to be the American idea of it, since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no law should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.*

The essential difference between the British Government and the American Constitutions will place this subject in the clearest light.

In the British Government the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the legislature are not only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the executive. Hence it is a principle that the Parliament is unlimited in its power, or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people, such as their Magna Charta, their Bill of Rights, etc., are not reared against the Parliament, but against the royal pre-

rogative. They are merely legislative precautions against executive usurpations. Under such a government as this an exemption of the press from previous restraint by licensers appointed by the King is all the freedom that can be secured to it.

In the United States the case is altogether different. The *people,* not the Government, possess the *absolute sovereignty.* The *legislature,* no less than the *executive,* is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence in the United States the great and essential rights of the people are secured *against legislative* as well as against *executive ambition.* They are secured, *not by laws paramount to prerogative,* but by *constitutions paramount to laws.* This security of the freedom of the press requires that it should be exempt not only from *previous restraint* by the executive, as in Great Britain, but from legislative *restraint also;* and this exemption, to be effectual, must be an exemption not only from the *previous* inspection of licensers, but from the *subsequent* penalty of laws.

The state of the press, therefore, under the common law cannot in this point of view be the standard of its freedom in the United States."

* * * * * *

"The nature of governments elective, limited, and responsible in all their branches may well be supposed to require a *greater freedom* of animadversion than might be tolerated by the genius of such a government as that of Great Britain. In the latter it is a maxim that the King, an hereditary, not a responsible magistrate, can do no wrong, and that the

legislature, which in two-thirds of its composition is also hereditary, not responsible, can do what it pleases. In the United States the *executive* magistrates are not held to be *infallible* nor the *legislatures* to be *omnipotent*, and *both* being *elective* are both responsible. *Is it not natural and necessary, under such different circumstances, that a different degree of freedom in the use of the press should be contemplated?*" * * *

(See Senate Document 873, 62d Congress, 2d Session, Alien and Sedition Laws, Debates in the House of Delegates of Virginia, pp. 3, 172, 173.)

A brief resume of the struggle for the liberty of the press, both in Great Britain and in the Colonies, will serve to make plain what was in America, during the formative period of the Constitution, understood to constitute liberty of the press.

THE CONTEST FOR LIBERTY OF THE PRESS IN GREAT BRITAIN.

In 1622 the Weekly News, the first newspaper printed in England, made it appearance.

It was perhaps the darkest period of British despotism. James I was King. Freedom of speech had been almost entirely suppressed. Religious persecution was rife.

James denied that there was any right to print or publish, and only permitted the Weekly News to print news from *foreign parts*. Discussion of local affairs was not permitted under the rigorous censorship laws of the Tudors and Stuarts.

Prior to that the Libel Law had been employed for the suppression of books, and that instrumentality was, of course, also turned against the press.

A leading case was that of Martin Marprelate (1 St. Tr. 1271). The judge instructed the jury: "You have not to inquire whether he is guilty of the felony, but whether he is the author of the book. For, it is already set down by the judgment of all the judges in the land that whosoever was the author of that book was guilty by statute of felony."

We quote from Dawson on Liberty of the Press:

> In 1605 (5 Coke's Rep. 125), "A distinction was drawn between libels against private persons and libels against magistrates or public persons, a distinction which denied the press the right of qualified privilege for two centuries.
>
> With the Restoration freedoom of the press reached its lowest ebb. Qualified privilege was still swamped under the even larger problem of complete suppression of all news. No better illustration of the rigor of the law is to be found than the opinion of Lord Chief Justice Scroggs at the trial of Henry Carr, July, 1680 (7 St. Tr. 1111):
>
> 'When by the king's command we were to give in our opinion what was to be done in point of the regulation of the press, we did all subscribe that to print or publish any newspapers or pamphlets of news whatsoever is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing. . . . Therefore, this book, if it be made by him to

be published, it is unlawful whether it be malicious or not. . . . If you find him guilty and say what he is guilty of, we will judge whether the thing imports malice or no.'

Here, once more was definitely stated that nefarious proposition that publication was proof of guilt and that the court alone determined what constituted malice and libel. This decision shows how vigorously the courts were enforcing the Licensing Act then on the books—an Act growing naturally out of centuries of governmental monopoly of the press, and finally repudiated by the Commons in 1694 for all time.

After the Commons had refused to renew the Licensing Act, anyone might print what he would, but he was held strictly responsible to a rigorous interpretation and discipline by the courts. 'A fair and true report' was in no sense privileged, and, almost a century after the renunciation of censorship, Lord Mansfield declared from the bench that 'the greater the truth the greater the libel.'

Authors, printers, and publishers, desirous of giving accurate accounts of the proceedings of Parliament or of any of the courts were faced with two difficulties: a *Standing Order of both Houses of Parliament expressly forbid the publication of their own proceedings,* while the court frequently maintained the same restrictions; and, secondly, if the contents were libelous the very fact of publication convicted the defendant, and no evidence to prove the truth of the charges was admitted." (See Dawson on "Freedom of the Press," pp. 24, 25 and 26.)

Speaking of the year 1640, Cross in his History of England, page 464, states:

> "By a rigid censorship of the press and by a brutal punishment of those who evaded its restrictions an attempt was made to check attacks on the existing system. * * * so that in silencing them, voices were stifled that cried for better things."

Alexander Leighton was sentenced to pay a fine of $10,000.00; to have his ears cropped; to be pilloried and whipped, and to remain in prison for life.

William Prynne, a barrister of vast learning, for denouncing the theatre was sentenced to stand in the pillory, lose his ears, and be imprisoned. Leighton was guilty of a second offense; his ears were already cropped. Accordingly, the stumps were gleaned, and he was branded with the letters "S. L."

The punishment aroused great sympathy. The victims were surrounded by grieving multitudes.

Cross at page 640 states that "by 1695 a *long step* had been taken toward the emancipation of the press. Milton in the Areopagitica had made a noble but futile plea against censorship. In 1693 when the licensing act came up for renewal, it was renewed for only two years, and then allowed to expire. *The new era of the modern newspaper* now began. But, liberty had not been really achieved. In 1771, in the Woodfall case, Lord Mansfield confirmed the old doctrine that the jury could bring in only a verdict on the facts,

and that the judge would decide the law. That rule appears to have been the law until Fox's celebrated Libel Act of 1792."

But, it is interesting to note how the demand for liberty of the press had grown. A newspaper ventured to report the Parliamentary debates. "Parliament claimed its privilege had been violated. Colonel Onslow made a complaint to the House. A warrant of arrest issued. The people rose in riot. The Lord Mayor and Aldermen of London led in the effort to prevent the arrest of the printers. Among these were Crosby and Oliver. They were called to the bar of the House, and sent to the Tower." The Commons with the approval of the King practically surrendered.

As has been said, still in theory Parliamentary debates are privileged. But, no government ever dreams of reducing the theory to practice.

Fox's Libel Act was not passed until nearly a year after the American Bill of Rights was adopted. However, his Act was but the *statutory culmination of what was already in fact the law of England.*

Struggling forward toward liberty, the press had gradually extended its power and influence for more than a century and a half. Parliament had been compelled to yield to public opinion. And, after the American Revolution crystallization of British opinion toward liberty of the press had been rapid and impressive.

How stood the case in the Colonies?

In the early days of the Colonies British authorities sought to, and did impose the severest re-

strictions upon the press. But, the growing spirit of liberty made these prosecutions less frequent and convictions were rarely obtained.

One of the latest convictions was John Franklin, who satirized the general court and the Governor, and was imprisoned for one month. During that time his brother Ben ran the paper. And, when John Franklin was released, the paper continued to quite freely express the opinions of its editors.

Dawson in his "Freedom of the Press" pp. 53, 54 and 55, states:

> "More significant is the celebrated trial of Zenger (17 Howard St. Tr. 675), *which decided for the Colonies two problems then agitating England*—the right of the press to record and discuss the acts of the government, and the right of juries to decide the intent rather than the mere fact of publication. The trial attracted wide-spread interest, both here and in England. Thirteen editions of the report of the trial were published in London and in this country before 1791—the year when the first amendment was adopted, and only a few months prior to the Fox libel act in England. Gouverneur Morris characterized it as the 'dawn of that liberty which afterwards revolutionized America.'
>
> John Peter Zenger started the New York Weekly Journal November 5, 1733, in opposition to Governor William Cosby. For having repeatedly printed criticisms of public officials, Zenger was arrested on the charge of libel on Sunday, November 17, 1734, and was imprisoned for nearly nine months before he could obtain trial. But he continued to pub-

lish the Journal by a process which he himself describes: 'I have had since that Time, the Liberty of Speaking through the Hole of the Door, to my Wife and Servant by which I doubt not you'l think me sufficiently excused for not sending my last week's Journall, and I hope for the future by the Liberty of Speaking to my Servants through the Hole of the Door of the Prison, to entertain you with my weekly Journall as formerly.'"

Zenger employed Andrew Hamilton, who offered to prove the truth of the statements in the alleged libel. He was overruled. Thereupon Hamilton to the jury vehemently attacked the court's attitude. He asserted that the jury had the right beyond all dispute to determine both the law and the fact, and that it is the right of all free men "to publicly remonstrate against abuses of power or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings Heaven can bestow."

Hamilton boldly exhorted the jury to *disregard* the *instructions* of the court so manifestly partial to the Governor.

His peroration is one of the noblest defenses of liberty ever uttered. It was, in fact, the bugle blast which, ringing through the forests of America, summoned the Colonists to revolt.

We quote (p. 58):

"It is the best cause; it is the cause of liberty; and I make no doubt but your up-

> right conduct, this day, will not entitle you alone to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery, will bless and honor you as men who have *baffled the attempts of tyranny;* and by an impartial and uncorrupt verdict, have laid a *noble foundation* for securing to ourselves, our posterity, and our neighbors, that to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power in *these parts of the world* at least, *by speaking and writing truth.*"

The jury rose in answer to the magnificent appeal of Hamilton, and returned a verdict of "not guilty."

The Zenger case became the American precedent. Attempts to suppress free speech and free writing from that time ceased in America. Freedom of speech and freedom of the press was thereafter asserted and indulged.

Other prosecutions there may have been, but the Zenger case remained the pillar of cloud by day and the pillar of fire by night for every lover of liberty.

The American conception of the liberty of the press is further shown by the address to the inhabitants of Quebec by the Continental Congress on October 26, 1774. It declared that the English Colonists had five invaluable rights: representative government; trial by jury; liberty of the person; easy tenure of land and the freedom of the press.

> "The last right we shall mention regards the freedom of the press. The importance

> of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiment on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs." (See Dawson's "Freedom of the Press," p. 59.)

During the Revolution the press of America exercised absolute and unqualified liberty. Freedom of speech was everywhere enjoyed. Pamphleteers existed by the score.

In the heat of the Revolution the last vestiges of tyranny were consumed, and the purest gold produced in its crucible was the right of man to express his thoughts by free speech and a free press.

So firmly did the Fathers regard the liberty of the press as indisputable, that in the Constitutional Convention, when Pinckney introduced a "clause to the effect that the liberty of the press should be inviolably preserved (or observed)," Sherman answered: "It is unnecessary * * * The power of Congress does not extend to the press." The proposition on that ground was lost.

> "Later, Pinckney himself, in answering an objection raised during the discussion of the proposed Constitution in the South Carolina House of Representatives, said: 'With regard to the liberty of the press, the discussion of that matter was not forgotten by the members of the convention. It was fully debated,

and the impropriety of saying anything about it in the Constitution clearly evinced. The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press. That invaluable blessing, which deserves all the encomiums the gentleman has justly betsowed upon it, is secured by all our state constitutions; and to have mentioned it in our general Constitution would perhaps furnish an argument, hereafter, that the general government had a right to exercise powers not expressly delegated to it.'

Hamilton expressed the same view, in The Federalist, No. 84:

'For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restriction can be imposed?'

Such reasoning prevailed in the Convention, and the Constitution contained no guarantee of freedom of speech or press, except the immunity granted Congressmen for anything said in debates; but at once there was a popular outcry. Freedom of the press was demanded by several of the states. Virginia, New York and Rhode Island embodied a declaration of this right in their ratifications of the Federal Constitution, and Virginia expressly demanded an amendment also. Most significant, however, was the demand of Maryland, which in the convention of 1788 drew up a clause for the proposed Federal Bill of Rights, declaring: 'In prosecutions in the federal courts, for libels, the constitutional preservation of this great and fundamental right may prove invaluable.' Here, of course,

is an argument absolutely inconsistent with any Blackstonian limitation of the right of freedom to the mere absence of censorship.

In consequence of this wide-spread demand, the first Ten Amendments were appended to the Constitution as a Bill of Rights, in a form which made it far more effective than the similar documents of the European governments; for the Bill of Rights in a European constitution is a declaration of policies and nothing more, since the courts cannot disregard the legislature's will even though its acts violate the spirit of the constitution. On the other hand the American Bill of Rights performs the two-fold function: it fixes a definite limitation on the government's powers of action; and, long before the definite limitation is reached, it forces upon every official of the three branches of government a constant regard for certain declared principles of American life." (See Dawson's "Freedom of the Press," pp. 61, 62 and 63.)

Before the Constitution was adopted, state after state had declared for liberty of the press.

Maryland, 1776: "That the liberty of the press ought to be inviolably preserved."

Virginia, 1776: "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."

Pennsylvania, 1776: "That the people have a right to freedom of speech, and of writing, and of publishing their sentiments; therefore the freedom of the press ought not to be restrained."

Georgia, 1777: "Freedom of the press and trial by jury to remain inviolable forever."

Vermont, 1777: "That the public have the right to freedom of speech and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained."

South Carolina, 1778: "That the liberty of the press be inviolably preserved."

Massachusetts, 1780: "The liberty of the press is essential to the security of freedom in a state; and ought not, therefore, to be restrained in this commonwealth."

New Hampshire, 1784: "The liberty of the press is essential to the security of freedom in a state; and it ought, therefore, to be inviolably preserved."

Pinckney's Plan of 1787: "The Legislature of the United States shall pass no law touching or abridging the liberty of the press."

Nor does the doctrine for which we contend leave the government helpless or give license to the commission of crime. The highway is free to anyone, but no one may so use it as to prevent its use by others. When he does so, he deprives others of their legal right to pass along the highway. The right of property exists but the owner may not employ his property so as to create a public nuisance for that would be an interference with the legal right of others to enjoy their own property. The right of assemblage exists, but this does not authorize riotous conduct for thereby the peace is disturbed. The right of free speech exists, but it cannot be used to deprive wrongfully others of their good name.

In all these and a multitude of other instances it is found that the limitation upon the right exists only when the right is so used as to interfere with the personal or property rights of others.

So, too, liberty of the press fully exists, but it must not be employed for wicked or wrongful purposes. If it deprives a citizen of his good name, it may be punished for depriving him of that which is of inestimable value. So likewise, if it print obscene, profane or licentious matter, it may be punished because it interferes with the right of other citizens to live in an atmosphere of decency. It may not advocate riot, rebellion or treason for this is calculated to provoke a breach of the peace and may be destructive of all government.

The limitations on the right are, however, narrow and have been fully set out in a learned and carefully prepared opinion by the Supreme Court of Missouri in the case of *State ex inf. Crow, Atty.-General,* v. *Shepherd,* 177 Mo. 205, in the following language:

> "Liberty of the Press. The defendant invokes Section 14 of Article 2 of the Constitution (of Missouri), which is as follows: 'That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in suits and prosecutions for libel, the truth thereof may be given in evidence and the jury, under the direction of the court, shall determine the law and the fact.' It will be observed that the liberty

of the press is not mentioned at all. The freedom of speech is guaranteed to 'every person.' Of course, the press will be included in the general designation of 'every person.' But the press has no greater liberty in this regard than any citizen. Newspapers and citizens have the same right to tell the truth about anybody or any institution. Neither has any right to scandalize any one or any institution. *Barnes* v. *Campbell,* 59 N. H. 128, 47 Am. Rep. 183; *Pratt* v. *Pioneer Press Co.,* 34 Minn. 521, 26 N. W. 904; *Bronson* v. *Bruce,* 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307; *McAllister* v. *Detroit Free Press,* 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318; *Negley* v. *Farrow,* 60 Md. 158, 45 Am. Rep. 715.

The first Amendment to the Constitution of the United States specifically mentions the liberty of the press. It is as follows: 'Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.' It will be noted, however, that, though the press is here specifically referred to, it is coupled with the freedom of speech of the citizens and no special freedom is conferred upon the one that is not likewise conferred upon the other. It is most important, therefore, to clearly understand what is meant by 'freedom of speech,' or, as it is usually termed when speaking of newspapers, the 'liberty of the press.'

In 18 Am. & Eng. Enc. Law (2d Ed.), p. 1125, 'liberty of press' is thus defined. 'The liberty of the press consists in the right to

publish with impunity the truth, with good motives and for justifiable ends, whether it respects governments or individuals; the right freely to publish whatever the citizen may please and to be protected against any responsibility for so doing, except in so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals.'

Judge Cooley, in his invaluable work on Constitutional Limitations (6th Ed.), p. 518, says: 'The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common law rules which were in force when the constitutional guaranties were established and in reference to which they have been adopted.'

Paterson on the Liberty of the Press, etc., p. 5, clearly explains the right as follows: 'The restraints which confine the natural lib-

erty of speech will be found ranged under four great heads of blasphemy, immorality, sedition and defamation. There are bounds to be set to the expression of thoughts and opinions, and these must rest on the fundamental principles on which all societies are founded. It is assumed that there is a God in whom all citizens in their gravest moods are so interested that it becomes offensive to all the rest if any one speaks of Him publicly in a scurrilous and contemptuous tone, such as would provoke a breach of the peace. Hence the first limit to free speech is blasphemy. There are also rules of morality, which are so universal and so underlie the conscience of every individual that speeches and writings which treat these rules with public contempt, and sap and mine the simple faith in all that is good, noble and worthy, are also deemed a species of constructive breach of the peace too irritating to be allowed. Hence another limit to free speech and writing is immorality. Again, there are rules of good conduct, founded on the general duty of all citizens to support the government under which they live, and, if possible, to insure due respect and fair treatment to its leading administrators. Hence gross contempt of all laws and violent menaces of revolt against such guardians, must not be allowed, for these necessarily discompose every citizen and perplex him with fear of change or fear of public disaster and anarchy. And when this last head is still further examined it will appear that the great factors of government, consisting of the Sovereign, the Parliament, the ministers of state, the courts of justice, must all be recognized as holding functions founded on sound principles and to be

defended and treated with an established and well-nigh unalterable respect. Each of these great institutions has peculiar virtues and peculiar weaknesses, but whether at any one time the virtue or the weakness predominates, there must be a certain standard of decorum reserved for all. Each guarded remonstrance, each fiery invective, each burst of indignation must rest on some basis of respect and deference towards depository, for the time being, of every great constitutional function. Hence another limit of free speech and writing is sedition. And yet within that limit there is ample room and verge enough for the freest use of the tongue and pen in passing strictures on the judgment and conduct of every constituted authority. While the restrictions already mentioned, which are founded on blasphemy, immorality and sedition, show the boundaries of free speech and thought as affecting the public generally, there is a fourth limit on the other side as affecting individuals, known under the head of "Libel," or the invasion of the reputation of private persons. This last limit involves the necessity of at once tracing the origin of that tendency of the individual to acquire such reputation and the value it possesses in his eyes, for it is here that the exercise of one natural right clashes directly with the exercise of the other, and both are equally natural and equally inevitable.' "

But, these doctrines cannot be extended to criticism of the government, criticism of its laws, or publication of its acts. For, if that doctrine were ever established, then those in authority could completely silence public protest, perpetuate

their power and conceal their iniquities. We would be back to the year 1680 when Lord Chief Justice Scroggs in the trial of Henry Carr (7 St. Tr. 1111) declared:

> "When by the king's command we were to give in our opinion what was to be done in point of the regulation of the press, we did all subscribe that to print or publish any newspapers or pamphlets of news whatsoever is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing . . . Therefore, this book, if it be made by him to be published, it is unlawful whether it be malicious or not. . . . If you find him guilty and say what he is guilty of, we will judge whether the thing imports malice or no."

In the same case (7 St. Tr. 929) he further declared it criminal at common law to "write on the subject of government, whether in terms of praise or censure, it is not material; *for no man has a right to say anything of government.*"

Moreover, all public knowledge might be suppressed and the people, who are the source of all power and authority, be thus deprived of that knowledge which is vital to the exercise of that power.

The Government undertakes to sustain the indictment by the claim that the publication of the tax lists *might* interfere with the collection of future taxes and that, therefore, the Government has the right to forbid the doing of anything

which in the opinion of Congress would interfere with the exercise of a governmental power.

Concede that doctrine and to what extremity may not the government go? It might as well say that publication of the proceedings of Congress would interfere with those proceedings. With still greater force it could say that criticism of the Members of Congress might interfere with their independent judgment and lead them to wrong courses or intimidate them into refraining from action; that the President must not be criticised for any act done by him because he would be thereby intimidated and that the good will and good opinion of the people would be alienated. Thus we find ourselves again landed in the Middle Ages, enmeshed in its doctrines and involved in the darkness of its tyranny.

The Government's claim boiled down is that because the Government has the right to lay a tax, it can pass any kind of law it desires suppressing comment on the tax or criticism of the law, or any other act or word whatsoever which Congress may see fit to prohibit. Accordingly, the Government says that lists may be prepared and exposed to the public view so that everyone may see them, but no one may talk about them or write about them. If this be not in violation of the Constitution, then the Constitution is indeed less than a shadow.

We unqualifiedly declare that a citizen of the United States has a right to talk about, or a newspaper has the right to print any information whatsoever coming to it so long as the facts

stated are true; and that it makes no difference from what source knowledge is obtained, the moment it is obtained, it may be communicated by word of mouth, by pen or by press.

This does not deny the doctrine that the Government may keep its archives secret and may punish whomsoever breaks and enters, or by bribery or other illegal means obtains the information, but the information once lawfully obtained can be used without the right of the Government to interfere in any manner.

The Government states: "The main ground on which prohibition of publication of data contained in income returns is based, is to secure fuller and more accurate returns, etc."

It will be difficult to find evidence to support the contention.

Per contra the Congressional debates show that the chief opposition to publicity of returns was grounded on the claim that such publicity unnecessarily exposed the sources of the taxpayer's income, and whether he had made profits or sustained losses in particular ventures, and that these facts might be used by his business rivals, or affect his credit.

Upon the other hand, it was urged, and is undoubtedly true, that there could be no greater deterrent to the tax-dodger than the knowledge on his part that his return would be seen by many persons being more or less acquainted with his business affairs, who would know the return to be false, and would be likely to make the facts known to the authorities; that the fact that the return

would be made public would have a tendency to cause the taxpayer to make a full return, because of his desire to show a prosperous business.

Between these contending views Congress sought to afford a reconcilement, and to preserve somewhat of the virtues of each.

Accordingly, it preserved the secrecy of returns which disclosed the particular sources of income, profits or losses, and required the publication of lists which merely give the name, and the amount of the tax paid.

On the question of the reasonable relationship between the power to lay and collect revenue and the prohibition of Sec. 3167 R. S., as amended and embodied in Sec. 1018 of the Revenue Act, the decisions of this court on the Child Labor Laws are in point.

In the case of *Hammer* v. *Dagenhart,* 247 U. S. 251, holding unconstitutional an Act of Congress to prevent transportation in interstate commerce of the products of child labor, it was held that Congress could not, as an incident to its power to regulate commerce between the states, regulate local matters subject to the exercise of state police powers and having no bearing on interstate commerce. Among other things, the court said:

> "Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation." l. c. 272.

And again, l. c. 273 and 274, the court says:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture."

In the Child Labor Tax case, 259 U. S. 20, holding unconstitutional a tax on the employment of child labor, the court, after discussing the various provisions of the Act, said:

> "In the light of these features of the Act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?
>
> It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the mainte-

nance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Out of a proper respect for the acts of a co-ordinate branch of the Government, this court has gone far to sustain taxing Acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the Act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."

Applying the same reasoning to the case at bar, we say that Congress may not, under the guise of its taxing power, curtail the freedom of the press guaranteed by the First Amendment to the Constitution by prohibiting the publication of information available for public inspection.

Indeed, there is nothing in the record in this case, nor in the brief filed in behalf of the Government, to show any *fact or any argument* on which

to predicate the conclusion that the publication of the lists of taxpayers in the office of the Collector of Internal Revenue with the amount of tax paid will, in anywise, directly or indirectly, hamper or obstruct Congress in the laying and collection of taxes.

The cases cited by the Government, decided under the Espionage Act of June 15, 1917, do not support the contention of the Government. In each of these cases this court had before it for review the exact language contained in the articles complained of, and in each case the decision of the court was grounded upon the *fact* that the natural and inevitable effect of the published articles was to discourage men and the youth of the country from enlisting in the Army and Navy of the United States, thereby directly hampering and obstructing Congress in the effectual exercise and execution of its delegated power to raise and support armies.

No similar *fact*, the effect of which would hamper or obstruct Congress in laying and collecting taxes, is shown by the record in this case. It has not been shown, and cannot be shown, that the publication of the name, address and amount of tax paid by citizens will directly or indirectly obstruct Congress in the exercise of its constitutional power to lay and collect taxes.

III.

DISCUSSION OF CASES CITED BY THE GOVERNMENT.

The Government's brief cites many cases upon rules of statutory construction. These rules are hornbook law, and are in all their phases entirely familiar to the court. We shall only refer to a few of them in passing.

The case of *Merchants National Bank of New Haven* v. *United States,* 214 Fed. 200, is cited by the Government as authority for the statement that Sec. 1018 should prevail over Sec. 257 of the Revenue Act of 1924, because it is the last expression of the legislative will. In that case the court first laid down the general principle, as follows:

> "It has been held on more than one occasion by the Supreme Court that if a literal interpretation of any part of a statute would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be neglected."

The court further says:

> "But we think in such a case the difficulty is settled by the rule that *in case of conflicting provisions,* if both were enacted at the same time, the last in order of arrangement controls."

As already pointed out in this brief, there is no conflict between Sec. 257-b and Sec. 1018 of the Revenue Act.

United States v. *Stowell,* 133 U. S. 1, and *Merritt* v. *Welsh,* 104 U. S. 694, are cited by the Government as authority for the statement that laws are to be construed so as to carry out the intention of the legislature, and that intention must be found from the language used. We concur in this statement of the law, but we call attention to the fact that in *Merritt* v. *Welsh,* Sec. 2504 of an Act of Congress provided the Dutch standard of color as the test for fixing the duty on different grades of sugar, while Sections 2914 and 2915, which appear later in the Act in the order of arrangement, contained language under which the Secretary of the Treasury prescribed regulations applying the test of constitution or chemical quality. The court held that the language of the earlier section of the Act was conclusive, and that Congress had definitely fixed the Dutch standard of color as the test, notwithstanding the fact that the later sections might have been construed to authorize the Secretary of the Treasury to apply the constitution or chemical quality test. In discussing the question that quality was the object sought, as shown by Sections 2914 and 2915, the court said:

> "This reasoning would be very good if the law prescribing the standard were not explicit in its terms. Whatever may have been in the minds of individual members of Congress, the legislative intent is to be sought, first, from the words they have used. If these are clear, we need go no further; if they are obscure or ambiguous, then the intent may have to be sought out by reference

to the context, to previous or concurrent enactments, to the history of the art or trade, to general history, to anything that will throw light on the meaning of the obscure or ambiguous terms used. But there is no obscurity or ambiguity here."

Likewise, it might be said that there is no obscurity or ambiguity in the Revenue Act of 1924, as Sec. 257-(b) clearly makes the lists provided for therein public property.

The case of *United States* v. *Ninety-nine Diamonds,* 139 Fed. 961, is cited for authority to the statement that no part of the two sections of the Act should be permitted to perish by construction. We quote from that case as follows:

> "Cardinal rules for the interpretation of the law are that the intention of the legislative body should be ascertained and given effect, and that this intention must be deduced, not from a part, but from the entire statute which expresses it, because the legislature did not express its intention by a portion, but by all of the law upon the subject."

After analyzing the Act of Congress under consideration, the court further says:

> "But a penal statute which creates and denounces a new offense should be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified by such a statute. An Act, which is not clearly an offense by the express will of the legislative department of the Government, must not be made so after its com-

> mission by the interpolation of expressions or by the expunging of some of its terms by the judiciary."

If Sec. 1018 be construed to prohibit the publication of the lists made public by the Commissioner of Internal Revenue, then that portion of the statute providing for publicity of these lists is made to perish by construction.

The case of *Washington Market Company* v. *Hoffman,* 101 U. S. 112, is also referred to on the point last above mentioned and quoted from in the Government's brief. Without criticizing the language quoted, we call attention to the further language of the court, as follows:

> "Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." l. c. 116.

The court further said:

> "In *Brewer's Lessee* v. *Blougher* (14 Pet. 78), it was said to be the undoubted duty of the court to ascertain the meaning of the legislature from words used in the statute, and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it."

The court further pointed out that a construction should be adopted which gives effect to the entire Act, "denies effect to no other words or provision in the statute and is in strict harmony with every part."

In the Government's brief, *Treat* v. *White,* 181 U. S. 264, and *Columbia Water Company* v. *Columbia Co.,* 172 U. S. 475, are cited to establish that words are to be understood in their natural, ordinary and familiar meaning. This is undoubtedly the law. In the former case, after laying down the rule, the court said:

> "With that rule of construction we are in entire sympathy, and approve of it. * * * We do not question the fact that there are times when the mere letter of a statute does not control, and that a fair consideration of the surroundings may indicate that that which is within the letter is not within the spirit, and therefore must be excluded from its scope. *Church of the Holy Trinity* v. *United States,* 143 U. S. 457."

The Church of the Holy Trinity case, referred to in the above quotation, is an interesting discussion on the question of applying the letter of the statute against the intention of Congress, and holds that this will not be done. The court quotes from Lord Coke as follows:

> "The language of the Act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the Act must be so construed as to avoid the absurdity. The court

> must restrain the words. The object designed to be reached by the Act must limit and control the literal import of the terms and phrases employed."

Again quoting from *U. S.* v. *Kirby*, 7 Wall. 482:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

Inasmuch as it was the evident intention of Congress to make public the list posted in the office of the Collector of Internal Revenue, under this authority the court should so construe the Act.

The Government undertakes to dissect the phrase, "available to public inspection," and seeks to demonstrate that the word "inspection" means simply a "close scrutiny or careful investigation."

The defect of the argument lies in the attempt to tear a word from a clause of which it is a part. The language of the law is, "available to public inspection," and the word "public" is defined by Webster as:

> "Of, or pertaining to the people; belonging to the people; relating to or affecting a nation, state or community—opposed to private; open to the knowledge or view of all; general; com-

> mon, notorious, as public report, public scandal; open, common or general use, as a public road, a public house, the public street, public acts or statutes affecting matters of public concern," etc.

Again, public is defined as:

> "The general body of mankind or of a nation, state or community; the people indefinitely, as the American public," etc.

With this definition before us, it seems plain that the phrase "available to public inspection" is not limited to the prying examination of individuals, but that it means that the lists should be given to the nation at large.

This view is clearly sustained by the fact that the Commissioner was commanded to keep the lists in the office of each collector, and was authorized to make them known in such other places as he might determine. As previously said, he might have determined to print them in the press.

The word "inspection" as used in *Pabst Brewing Co.* v. *Crenshaw,* 198 U. S. 17, was used in a very different sense to that in which it is used in the Revenue Act of 1924. That case involved the validity of the malt liquor inspection law of Missouri. It does not require argument to show that there is a wide distinction between the use of the word "inspection" in such an Act, for the purpose of determining the quality of beer, and the use of the word "inspection" when used as a part of the phrase "open to public inspection."

The language of Chief Justice Marshall in *United States* v. *Hartwell,* 6 Wall. 385, quoted in the Government's brief, is misleading unless taken in connection with the following quotation from that opinion:

> "We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction."

The reference in 34 Cyc. 593, and the quotation from *Buck* v. *Collins,* 51 Ga. 391, in the Government's brief, is somewhat misleading for the reason that while the language quoted is contained in the opinion it is essentially dictum.

The case of *Buck* v. *Collins* involved the right of the plaintiff to copy from books in the office of the clerk of the Superior Court without assistance of the clerk, and he demanded the right

to do so without paying a fee, when the statute under which he was permitted to make an abstract of the records required the payment of a fee to the clerk. The case was decided on the ground that the abstract could not be made without payment of the fees provided by law. This is borne out by the language of the court, which we quote as follows:

> "In our judgment the rights claimed by the complainant thus to occupy the attention of a public officer, perhaps for weeks together, without fee or reward, is a perversion of the letter of the law, intended for one purpose, to another and different purpose not contemplated by the law-makers, and contrary to their intent. It stands exactly on the footing of the misconstruction mentioned by Blackstone, when it was concluded that because it was unlawful to draw blood in the streets, a surgeon was a law-breaker who bled a man found helpless therein. If someone familiar with the clerk's office, say an old clerk or a lawyer, whose business required him often to examine the books, were to make a business of it, and sitting at the clerk's door solicit every inquirer to give him the job, he would be no more a perverter of the law and infringer on the rights of the clerk than this complainant proposes to be.
>
> The avowed object of the complainant is to furnish to the public the contents of the books and papers of the clerk's office for his own profit. He proposes to say to the public, if you desire to inquire into a title or into the encumbrances upon an estate, or into the judgments against a citizen, you need not visit the clerk's office. you need not pay him

any fees. Here is my book—it is all there; you can get what you want without fees.

Our law gives the clerk no special fees for keeping safely the books, etc.; the pay he gets for this service—this duty—to be always on hand watching his books and keeping them ready of access, is the fees which, in the ordinary course of business, he will receive for inspections, abstracts, etc. The scheme of the complainant strikes at the very root of this lawful perquisite of the clerk and takes away from him those fees which the law contemplates he will receive for the performance of a duty cast upon him."

The case of *In re Caswell,* 18 R. I. 835, involved the request of Caswell to the clerk of the court for a copy of the proceedings in a divorce case for publication, or otherwise. The clerk asked the court for advice as to his duty in the premises. While the court advised the clerk that he should not furnish the copy, on the ground that judicial records should not be used to gratify private spite or promote public scandal, the court also said:

"At common law, every person is entitled to the inspection, either personally or by his agent, of public records (this term including legislative, executive and judicial records, etc.), provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. It is not essential, however, that the interest be private, capable of sustaining a suit or defense on his own per-

sonal behalf, but it will be sufficient that he act in such suit as the representative of the common or public right."

The case referred to in the Government's brief, as holding the contrary view to that of *Buck* v. *Collins,* is Marriage License Docket, 4 Pa. Dist. 162. In that case the petitioner, the manager of a daily newspaper published in Reading, Pa., made application to the clerk of the court for permission to inspect the marriage license docket (a public record) and to make memoranda of the contents thereof for publication. The court held that he was entitled to have free access to the records of the court, to the marriage license docket, and entitled to make memoranda of its contents, and that the clerk of the court was not entitled to a fee for permitting him so to do. We call attention to the following language of the court:

"But apart from the bearing which general considerations of public utility and welfare may have upon the question, it seems clear, upon another ground, that the petitioner, and all other citizens, are entitled to free access to the marriage license docket for inspection, and for the purpose of making memoranda therefrom, if they desire to do so. The docket is a public record, and the record therein of the issuance of a license is the record of a judicial act of the clerk. * * * The docket is not the private property of the clerk or of the parties to the intended marriage, but of the public. * * * It is said in Vol. 20, Am. & Eng. Ency. of Law, 507, that 'when, by express direction of a statute,

a memorandum is required to be kept, the memorial made in compliance with the statute is a public record'; and at p. 508, that 'a memorandum or book which has been kept by persons in public office, because required or made useful by the nature of the office, or expressly required to be kept by statute, is a public record.' * * * Certainly these statutory requirements and qualities constitute the record a public one. Now, in this country, a public record is accessible to all: Wharton on Evidence, 745. In *Burton* v. *Tuite*, 78 Mich. 363, Morse, J., said: 'I do not think any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record. I have a just right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it, or intend to have. I also have a right to examine any title that I see fit, recorded in public offices, for the purpose of selling such information, if I desire.'"

The court also quoted from *Lum* v. *McCarty*, 39 N. J. 287, as follows:

"The clerk is the lawful custodian of the records and indexes thereto, and is responsible for the safe keeping thereof. His powers over them are such as are necessary for their protection and preservation. To that

> end, he may make and enforce proper regulations consistent with the public right for the use of them. But they are public property, for public use, and he has no lawful authority to exclude any of the public from free access to an inspection and examination thereof, at proper seasons, and on proper application. He has no exclusive right to search the records. In practice, it has been found that no abuse or inconvenience has arisen from it."

Belt v. *Prince George's County Abstract Co.*, 73 Md. 289, cited by the Government, involves substantially the same controversy as that of *Buck* v. *Collins, supra,* and both cases involve the right of a person to make copies from a record without paying fees provided by law. Neither case involves the right of an individual to publish public records.

Ex Parte Curtis, 106 U. S. 371, was decided on the ground that the Government has a right to control its employees and to prevent an employee in a position of authority from requiring those under him to contribute from their personal income to expense of political campaigns, which was a proper exercise of the powers delegated to Congress. As a preliminary to the discussion of the case the court said:

> "That the government of the United States is one of delegated powers only, and that its authority is defined and limited by the Constitution, are no longer open questions; but express authority is given Congress by the

> Constitution to make all laws necessary and proper to carry into effect the powers that are delegated. Art. 1, Sect. 8. Within the legitimate scope of this grant Congress is permitted to determine for itself what is necessary and what is proper."

In the Burton case, 202 U. S. 344, it was expressly stated that the provision in the Constitution of the United States that "all legislative power herein granted shall be vested in a Congress of the United States" meant that Congress, keeping within the limits of its powers and observing the restrictions imposed by the Constitution, may, in its discretion, enact any statute appropriate to accomplish the object for which the National Government was established.

The case of *McCray* v. *United States,* 195 U. S. 27, involved the constitutionality of an act of Congress levying a tax of 10c per pound upon oleomargarine when artifically colored. The case can have no bearing on the case at bar for the reason that it involves solely the question as to whether or not Congress had properly exercised an express power, i. e., the power to tax.

Veazie Bank v. *Fenno,* 8 Wall. 533, sustained an act of Congress placing a tax on notes of State Banks, on the ground that the Constitution gave Congress the power to provide a circulation of coin, and having undertaken to provide a currency for the whole country, it had the right to secure the benefit of such currency to the people by appropriate legislation, and could restrain, by suitable enactments, the circulation as money of any notes

not issued under its own authority. The court said: "Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile."

Patterson v. *Colorado,* 205 U. S. 454, was a writ of error to review a judgment upon an information for contempt. This court, speaking through Mr. Justice Holmes, said, "What constitutes contempt * * * is a matter of local law," and further, "The only question for this court is the power of the State."

The majority opinion specifically states: *"We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First."* So that the remarks in the principal opinion with respect to the First Amendment are clearly dictum. They were sufficient, however, to call forth a vigorous dissenting opinion by Mr. Justice Harlan. So far as we have been able to find by diligent search of the authorities, this opinion of Mr. Justice Harlan is the only comprehensive discussion of the right of free speech and freedom of the press by any member of this court speaking officially. For that reason we quote from it as follows:

> "I cannot agree that this writ of error should be dismissed. By the First Amendment of the Constitution of the United States, it is provided that 'Congress shall make no law respecting an establishment of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and to petition the Government for redress.' In the Civil Rights cases, 109

U. S. 1, 20, it was adjudged that the Thirteenth Amendment, although in form prohibitory, had a reflex character in that it established and decreed universal civil and political freedom throughout the United States. In *United States* v. *Cruikshank*, 92 U. S. 542, 552, we held that the right of the people peaceably to assemble and to petition the Government for a redress of grievances—one of the rights recognized in and protected by the First Amendment against hostile legislation by Congress—was an attribute of 'national citizenship.' So the First Amendment, although in form prohibitory, is to be regarded as having a reflex character and as affirmatively recognizing freedom of speech and freedom of the press as rights belonging to citizens of the United States; that is, those rights are to be deemed attributes of national citizenship or citizenship of the United States. No one, I take it, will hesitate to say that a judgment of a Federal court, prior to the adoption of the Fourteenth Amendment, impairing or abridging freedom of speech or of the press, would have been in violation of the rights of 'citizens of the United States' as guaranteed by the First Amendment; this, for the reason that the rights of free speech and a free press were, as already said, attributes of national citizenship before the Fourteenth Amendment was made a part of the Constitution.

Now, the Fourteenth Amendment declares, in express words, that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' As the First Amendment guaranteed the rights of free speech and of a free press against hostile action by the United States,

it would seem clear that when the Fourteenth Amendment prohibited the states from impairing or abridging the privileges of citizens of the United States it necessarily prohibited the states from impairing or abridging the constitutional rights of such citizens to free speech and a free press. But the court announces that it leaves undecided the specific question whether there is to be found in the Fourteenth Amendment a prohibition as to the rights of free speech and a free press similar to that in the First. It yet proceeds to say that the main purpose of such constitutional provisions was to prevent all such 'previous restraints' upon publications as had been practiced by other governments, but not to prevent the subsequent punishment of such as may be deemed contrary to the public welfare. I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any state since the adoption of the Fourteenth Amendment can, by legislative enactments or by judicial action, impair or abridge them. In my judgment the action of the court below was in violation of the rights of free speech and a free press as guaranteed by the Constitution.

I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that

> clause of the Fourteenth Amendment forbidding a state to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the Nation or by the States, which does not embrace the right to enjoy free speech and the right to have a free press."

Inasmuch as the right of free speech and freedom of the press is so vigorously challenged by the Government in this case it is submitted that this court ought to lay down in no uncertain terms a clear, comprehensive and unequivocal construction of these rights as they are guaranteed by the First Amendment to the Constitution.

In discussing the "suggestion in the opinion of the learned court below that Section 3167 R. S. * * * is an attempt to regulate matters of a purely local nature, presumably in violation of the Tenth Amendment to the Constitution," counsel for the Government refers to the case of *McCulloch* v. *Maryland,* 4 Wheat. 316, and state, *"The Federal power to lay and collect taxes is complete and supreme in its field."* It is a sufficient answer to this statement and to the quotation from *McCulloch* v. *Maryland* to say that there is not involved in this case in any manner, directly or indirectly, the power of the Federal Government to lay and collect taxes. That power had been fully exercised and the taxes laid collected before the lists were made public. But when the lists were made public in the office of the Collector and a person had obtained information from them law-

fully, his knowledge thus obtained became at once a matter of purely a local nature and for Congress to undertake to regulate the use of such knowledge of an individual was to undertake the regulation of a matter of purely local nature. No such power has ever been granted to Congress and no such power may be implied from any express power granted.

Without attempting to review the cases cited by the Government on the question of the right of free speech and liberty of the press, we assert that the only limitations which have ever been placed on these rights by the courts are included under one of four heads, blasphemy, immorality, sedition and defamation or libel, which are discussed at length in the opinion of Judge Marshall, of the Supreme Court of Missouri, *supra*. Inasmuch as the indictment in the case at bar charges only the publication of information made available to public inspection, and not even comment, we submit that there is no limitation on the right of the freedom of the press which would prevent such publication.

The importance of the question involved, together with the fact that the Solicitor General was unable to hand us his brief until very recently, involving hasty preparation on our part, is our apology for the length of this brief.

JAMES A. REED,
MAURICE H. WINGER,
DAVID M. PROCTOR,
Attorneys for Defendants in Error.

No. 847.

In the Supreme Court of the United States

OCTOBER TERM, 1924.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

THE BALTIMORE POST,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE DEFENDANT IN ERROR.

NEWTON D. BAKER,
Counsel for Defendant in Error.

INDEX.

Cases and Texts Cited.

No. 847.

In the Supreme Court of the United States

OCTOBER TERM, 1924.

THE UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

THE BALTIMORE POST,

Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE DEFENDANT IN ERROR.

This is a writ of error to a judgment of the District Court of the United States for the District of Maryland, sustaining a demurrer and a supplemental demurrer to an indictment. The opinion of the District Judge was filed on the 16th day of December, 1924, and appears at large in the record, page 6. It is published as *United States vs. Baltimore Post Company,* 2 Fed. (2nd) 761.

The indictment charges that the defendant violated the provisions of R. S. 3167, as re-enacted by Section 1018

of the Revenue Act of June 2nd, 1924 (43 Statutes 253-254).

The indictment is in five counts and charges that the defendant, unlawfully and in a manner not provided by law, did print and publish in its newspaper a part of the income return of a person named.

In the first count it is said that one J. Cookman Boyd made an income return to the Collector of Internal Revenue of the United States, at Baltimore, showing, among other things, the amount of the income tax of said Boyd accruing to the United States for the taxable year 1923 to be $150.65, that thereafter the Commissioner of Internal Revenue of the United States determined said sum to be the amount paid to said collector by said Boyd, and that on the 24th day of October, 1924, a list of income taxpayers in said collection district, containing the name of said Boyd and showing the amount of income tax so paid by him, was prepared and made available to inspection in the office of the said Collector at Baltimore, and that thereafter the Baltimore Post Company caused to be printed, in the Baltimore Daily Post, the name of said Boyd and said amount as contained in the list made by the Collector and by him made available to public inspection in his office.

The other four counts of the indictment charged, in identical language, similar publications as to other individuals.

A general demurrer was filed as to each and every count of the indictment, and later a supplemental demurrer was filed, setting up four grounds of infirmity in the indictment. (Record P. 6)

ISSUES RAISED.

In the opinion of the court (Record P. 7) the grounds of the demurrer are stated to be three, as follows:

> (1) That the matter published by the defendant was no part of the income return, but merely a copy of the list prepared and made available to public inspection by the commissioner.
>
> (2) That it is the duty of the commissioner under the provisions of section 257 (b) of the revenue act of 1924, to prepare and make available for public inspection in each collection district, list containing the name of each person making an income tax return and the amount of tax paid by him, and therefore the publication made by the defendant was not a printing or publishing of a part of an income return in a manner not provided by law in violation of R. S. section 3167.
>
> (3) That if R. S. section 3167, interpreted in connection with section 257, forbids the printing in a newspaper of the name of the taxpayer and the amount of tax paid, contained in the lists open to public inspection, then to that extent section 3167 is unconstitutional, since it abridges the freedom of the press protected by the first amendment to the Constitution of the United States.

The trial judge reached the conclusion that "Congress did not intend to penalize the publication of the Commissioner's lists by the press," and, therefore, limited his discussion to the second ground above stated. In order, however, to have the whole matter before the court here, we will argue the three grounds in the order stated.

ISSUES INVOLVED.

The sections of the statutes immediately involved in this proceeding are Section 257 of the Revenue Act of June 2, 1924, and Section 3167, Revised Statutes (Comp. St. Section 5887), as re-enacted by Section 1018 of the Revenue Act of June 2nd, 1924, (43 Stats. 253-254). The two sections are as follows:

> "Sec. 257. (a) Returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President: Provided, that the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, or a special Committee of the Senate or House, shall have the right to call on the Secretary of the Treasury for, and it shall be his duty to furnish, any data of any character contained in or shown by the returns or any of them, that may be required by the committee; and any such committee shall have the right, acting directly as a committee, or by and through such examiners or agents as it may designate or appoint, to inspect all or any of the returns at such times and in such manner as it may determine; and any relevant or useful information thus obtained may be submitted by the committee obtaining it to the Senate or the House, or to both the Senate and House, as the case may be: Provided further, that the proper officers of any state may, upon request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of the corporation, at such times and in such manner as the Secretary may prescribe: Provided further, that all bona fide shareholders of record owning 1 per centum or more of the outstanding

stock of any corporation shall, upon making request of the Commissioner, be allowed to examine the annual income returns of such corporation and of its subsidiaries. Any shareholder who pursuant to the provisions of this section is allowed to examine the return of any corporation, and who makes known in any manner whatever not provided by law the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any such return, shall be guilty of a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both.

"(b) The Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal revenue district and in such other places as he may determine, lists containing the name and post office address of each person making an income tax return in such district together with the amount of the income tax paid by such person."

"Sec. 3167. It shall be unlawful for any collector, deputy collector, agent, clerk or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return or any part thereof or source

of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

In Section 257 (b) of the foregoing, it will be observed that the Commissioner is required to prepare and make available to public inspection, "in such manner as he may determine, in the office of the collector, * * * and in such other places as he may determine, lists containing the name * * * of each person making an income tax return * * * together with the amount of the income tax paid by such person." The publications alleged to have been made by the defendant are admitted to have been drawn from lists so prepared by the Commissioner and the data published were the names and amounts of tax paid, as set forth in said lists, and made available to public inspection by being posted in the office of the Collector.

The question, therefore, is, Did such publication violate the provision of R. S. 3167, as above set forth, which is: "It shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return or part thereof * * *"?

THE MATTER PUBLISHED WAS NO PART OF AN INCOME RETURN.

In order to state the position of the defendant in this behalf, it is necessary to examine, somewhat intimately, the Revenue Act of June 2, 1924. The sections of that act referred to are set forth in full in an appendix. By Section 223 of the Act, each individual is required to make, under oath, "a return." The return it required to state specifically is (a) "gross income" and (b) "the deductions and credits allowed under this title."

By Section 213 of the Act, the words "gross income" are defined, inclusively and exclusively. Paragraph (a) of that section tells what is included in the phrase "gross income" and paragraph (b), under seven sub-divisions, eliminates exemptions which are not included in the term.

By Section 214 of the Act, the word "deductions" is defined. Sub-division (a) of that section, in ten paragraphs, deals with deductions to be used in computing the net income of individuals. Sub-division (c) of that section discriminates the cases of aliens making individual returns.

Under Section 216 of the Act, the word "credits" is defined and covers comprehensively all the credits allowed individuals for the purpose of normal tax.

The income return required by Section 223 of the Revenue Act is, therefore, by statutory definition, a return stating specifically gross income, deductions and credits, and nowhere in this statute is the amount of tax to be paid either required to be estimated by the taxpayer filing the return or made a part of the return.

On the contrary, the amount of tax to be paid is, by Section 271 of the Act, a determination made by the Commissioner *after* the return is filed.

We shall see, in an historial survey of this subject, that prior to the enactment of the Revenue Law of June 2, 1924, the statutes authorized and required the making of lists of the names of income taxpayers and that such lists, when made, were thrown open to public inspection by the mandate of the statute, and no question was ever raised that the subsequent publication of the names in such lists constituted a violation of the prohibition contained in R. S. 3167. When the act of June 2, 1924 was passed, however, the lists were required to contain in addition to the name, the amount of tax paid, and it is fair to assume that Congress knew of the practical interpretation which had been given to this subject, as it stood in the earlier act, and intended as much freedom to use the amounts of tax paid as had been exercised with regard to the names when the names then were required to be in the lists. When the act is examined at large, it appears that "returns" are the disclosures required to be made by individuals, partnerships and corporations in various categories, of the amounts and sources of their income. From incomes thus disclosed, certain deductions are authorized to be made, and then, from what would otherwise be computable as the tax upon the net income so derived, there are certain items authorized to be further deducted by way of credits. The duty of the taxpayer, therefore, individual, aggregate, or corporate, is to make the disclosures and claims necessary to enable the government represented by the Commissioner to determine and assess the tax. What the taxpayer is required to do and to disclose constitutes his return. What the Commis-

sioner subsequently does with regard to the return, becomes no part of the return itself. It need not be endorsed upon the paper filed by the taxpayer. Confessedly, it is a computation and determination based upon data in the return, but it is not the return nor is it any part of the return. It is, therefore, not comprehended by the language of Section 3167 which defines, quite specifically, the things which are not to be published as being "any income tax return or any part thereof or any source of income, profits, losses or expenditures as they appear in an income return." This elimination is of things in the return, things disclosed by the taxpayer, and set down by him in the return which he is required to make, and the definitions contained in the statutes of the words used in this prohibition do not include the amount of tax either as determined by the Commissioner or as paid by the taxpayer.

For this reason, therefore, the demurrer was properly sustained.

THE PUBLICATION IN QUESTION BEING PROVIDED BY LAW, IS NOT IN VIOLATION OF R. S. SECTION 3167.

The language of R. S. 3167, prohibiting publication, specifically provides that the prohibition is limited to printing or publishing "in any manner whatever not provided by law, any income return or any part thereof or source of income, profits, losses or expenditures appearing in any income return." If, therefore, the court should hold that the name of the taxpayer and the amount of tax payable, as determined by the Commissioner and actually paid by the taxpayer, constitute a part of an income tax return, then the further question arises whether its publication is prohibited by R. S.

3167. Manifestly if such publication is "provided by law," it is excluded by express terms from the prohibition contained in R. S. 3167.

In the unreported case of *Hubbard v. Blair*, decided December 3, 1924, in the Supreme Court of the District of Columbia, an injunction was sought by Hubbard against Blair, Commissioner, to prevent Blair from making available for public inspection the amount paid by Hubbard as an income tax and to prevent the publication of that figure by so making the same available to public inspection in his office at Boston and elsewhere. Judge Hoehling denied the injunction on the ground that under the provisions of Section 257 of the Revenue Act of June 2, 1924, it was made the duty of the Commissioner to make the name of the taxpayer and the amount paid by him available for public inspection in his office and elsewhere in his discretion, and this duty was imposed by a valid and constitutional statute. The trial court did not pass upon a question said to lurk in the record as to whether or not, the Commissioner having so posted for public inspection the list of names and amounts, newspapers might thereafter publish the contents of the lists. The case did, however, involve an examination of the two sections of the statutes involved in these proceedings and we quote from Judge Hoehling's opinion the following chronological history of R. S. 3167, and, subjoined to it, an account of the legislative history of Section 257 of the Revenue Act of June 2, 1924. It is our belief that the purpose of these two sections becomes plainly apparent when their history is thus read:

> "The first income tax law was that of August 5, 1861, (12 *Stat.* 294.) which imposed a tax of twenty millions of dollars, apportioned, and to be

levied wholly on real estate; and it, also, levied taxes on incomes whether derived from property or profession, trade, or vocation. Apparently, the only reference therein as to publicity is found in Section 49 thereof, (being the section which imposed the income tax) in these words; 'and the said taxes, when so assessed *and made public,* shall become a lien on the property or other sources of said income for the amount of the same,' etc. (Italics supplied).

"Next following the act of July 1, 1862. *(id. 473)* which repealed the above section 49, (and certain other sections,) and enacted other sections in lieu thereof; but, in the new or substitute sections, the above words 'and made public,' do not appear; nor was the same or similar designation again used in the succeeding legislation of that period, so far as the Court has ascertained from reading the acts. (See, acts of March 3, 1863, *id. 718;* June 30, 1864, *13 id. 281;* March 3, 1865, *id. 479;* March 10, 1866, *14 id. 4;* July 13, 1866, *id. 137;* March 2, 1867, *id. 477;* and finally, July 14, 1870, 16 *id. 256.*)

"The above legislation grew out of the Civil war, and the system of taxation therein provided ceased to be operative with the end of the year 1871.

"As a matter of history, the Court understands that income tax lists were printed and published during at least parts of the period while said legislation was operative; and, further, that the publication thereof, then as now, provoked controversy, both for and against. Whether the matter proceeded further than public discussion, the Court is not advised; nor has it found any decided case concerning the matter, if any such case there be.

"In passing, it may be noted that Section 38, of the above act of June 30, 1864, contains the following provision:

> 'Provided. That if any such officer shall divulge to any party, or make known in any manner other than is provided in this act, the opera-

tion, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, he shall be subject to the penalties prescribed in section *thirty-five* (thirty-six) of this act.'

"The mistake of writing the words '*thirty-five,*' instead of thirty-six, was corrected, by amendment, in the subsequent act, of March 3, 1855, *supra.*

"The above provision later became original Section 3167 R. S. U. S., (to be further noticed below;) although, as will be seen from its language, it had reference, (before its amendment in more recent years,) to 'the operations, style of work, or apparatus of any manufacturer or producer,' visited by an internal revenue officer in the discharge of his official duties; and then had no relation whatever to an income tax return.

"Thus the matter stood during the years, and without change or amendment, until the enactment of the Federal income tax law, (later held unconstitutional, *Pollock v. Farmers' Loan & Trust Co.,* 158 U. S. 601) of August 15, 1894, *(28 Stat. 509, 557;)* which latter reenacted the provisions of said Sec. 3167, R. S. U. S.; but it added thereto an express prohibition against disclosure of—

'the amount or source of income, profits, losses, expenditures, or any particulars thereof, set forth or disclosed in any income return, by any person or corporation, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof, to be seen or examined by any person except as provided by law,' etc.

"And the act made it further unlawful for—

'any person to print or publish, in any manner whatever not provided by law, any income tax return or any part thereof or the amount or source of income, profits, losses, or expenditures appearing in any income tax return,' etc.

"The violation of any of the above provisions was made to be a misdemeanor, punishable in like manner as provided in said original Section 3167, R. S. U. S.

"Next in order of time and importance, in tracing the history of revenue legislation, insofar as it relates to the matter of publicity, is the corporation tax laws, of August 5, 1909, *(36 Stat. 11;)* the sixth subdivision of No. 38 of which act provided, that, when the assessment shall have been made as therein provided:

> 'the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue, and shall constitute public records, and be open to inspection as such.' (Italics supplied.)

"An amendment to that provision was made by the act of June 17, 1910, *(id. 494,)* as follows:

> 'Provided, That any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President.'

"Note: The above provisions of the corporation tax law will be further considered later on herein.)

"Later on came the Federal income tax law, of October 3, 1913, *(38 Stat. 114, 177,)* wherein said Section 3167 is reenacted in the same language in which it had been set forth in the act of August 15, 1894, *supra;* and, therefore, it need not here be repeated. Furthermore, the same Section 3167, as so amended, was carried forward, and in the same language, in the several succeeding Revenue Acts, of September 6, 1916, *(39 id. 756, 773;)* February 24, 1919, *(40 id. 1057;)* November 3, 1921, *(42 id. 268;)* and, finally, in the present act of June 2, 1924."

HISTORY OF SECTION 257 OF THE REVENUE LAW OF JUNE 2, 1924.

From the foregoing, it is to be observed that the first income tax law of August 5, 1861, provided that the tax, when assessed "and made public," should become a lien on the property or other sources of income of the taxpayer, and that publicity was provided in the corporation tax laws but that otherwise secrecy was imposed in the Income Tax Law of February 24, 1919 (40 Stats. 1057). Section 257 of the Act of 1919 provided that the returns upon which the tax had been determined by the Commissioner should constitute public records, but should be open to inspection only upon the order of the President and under rules and regulations prescribed by the Secretary of the Treasury and approved by the President, with three provisos, first, that state officers of any State, imposing an income tax, might, upon the request of the Governor thereof, have access to the returns of the corporations; second, that all bona fide stockholders of record in the corporation, owning 1% or more of its outstanding stock, should be permitted to examine the income return of the corporation; and, third, that "the Commissioner shall, as soon as practicable in each year, cause to be prepared and made available to public inspection, in such manner as he may determine, in the office of the Collector in each internal revenue district, and in such other places as he may determine, *lists containing the names and post office addresses of all individuals making income tax returns in such district.*"

The Revenue Act of November 23, 1921 (42 Stats. 268) reenacted Section 257 as above quoted without change.

Finally the present Revenue Act of June 2, 1924, was introduced into the House of Representatives and there at once began a controversy as to the policy of secrecy in income tax returns. The House passed the bill containing Section 257, as it was in the Act of 1919. When the matter came to the Senate, however, Senator Norris offered an amendment by which it was proposed to strike out the major part of the section and to add the words "and shall be open to examination and inspection as other public records." The debate had in the Senate plainly shows that the purpose of the Norris Amendment was to make a complete disclosure of everything contained in the income tax returns and of all the subsequent treatment of them by the public authorities. The Norris Amendment was accepted in the Senate and the bill passed that body in that form. Thereafter the measure was committed to a conference of a committee of the two houses and was reported back and passed in the form in which the act now is.

It is noteworthy that in this controversy between the Senate and House, as to whether or not there should be publicity with regard to income tax returns, these experienced legislators confined their attention to the provisions of Section 257, and no suggestion was made in either House to amend Section 1018 of the Act, reenacting R. S. 3167. This can have been upon no other theory than that R. S. 3167 penalized only the publication of things not by law expressly authorized to be published and that whatever publicity is directed by Section 257 of the Act is thereby excluded from the prohibitions of R. S. 3167.

That this is the correct view is clear from a comparison of the provisions of the sections themselves apart

from their history. R. S. 3167 begins by making it unlawful for any collector or other officer or employe of the government to divulge "the operations, style of work or apparatus of a manufacturer or producer visited by him in the discharge of his official duties." It next prohibits such collector from divulging (a) the amount of income; (b) the source of income; (c) the profits; (d) the losses; (e) the expenditures, or any particular of the foregoing set forth or disclosed in any income return. Next it prohibits such collector from permitting any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or used by any person except as provided by law. So far the prohibitions of the Act are definite and explicit. Next comes the sentence here in question. By it any person, not merely a collector or officer or agent of the government, is prohibited from printing or publishing *in any manner whatever not provided by law,* any income return or any part thereof, or source of income, profits, losses or expenditures appearing in the income return. In other words, R. S. 3167 has been permitted to remain in this body of statutes, in practically unamended form, over a period of years, during which the revenue laws of the country affecting income taxation have been repeatedly amended, and the crime denounced by R. S. 3167 has varied in its constituents from time to time as other parts of the Revenue Law have either imposed secrecy or authorized publicity as to transactions under the Act.

When Section 257 of the Income Tax Law of 1919 was in force, the only publicity directed to be made was of the names and post office addresses of the taxpayer. When the Act of 1924 was enacted, corresponding publicity was directed to the amount of tax paid as determined

by the commissioner. If, therefore, either the names and post office addresses of the taxpayer or the amounts of tax paid by them could, by any construction, be regarded as a part of income tax returns, then the publicity, authorized as to them, constituted them an exception to the prohibitions contained in R. S. 3167. By no other construction could these sections be reconciled.

Judge Soper, in the District Court of Maryland, in the trial of this case below, (Record pp. 10, 11) said:

> "Congress took a long step toward general publicity of income tax returns in the act of 1924. Therefore, although public records, they were open to inspection only upon presidential order, excepting only the cases of State officers and stockholders of corporations under certain conditions. In 1924 certain congressional committees were authorized to call on the Secretary of the Treasury and to secure 'any data of any character contained in or shown by the returns, or any of them, that may be required,' and 'to inspect all or any of the returns at such times, and in such manner' as they may determine, and to submit any relevant or useful information thus obtained to the Senate or the House, as the case may be. Such provisions were calculated to lead to the publication by the press of information so obtained.
>
> "More important and significant was the amendment of section 257 (b) whereby public inspection was granted to every one so far as names and amounts were concerned. The privilege was not limited to those who had a personal or property interest to protect. It was accorded to all, without reason and without fee. Nor was it limited to those who might come to the office of the collector to satisfy a legitimate interest or an idle curiosity. In the discretion of the commissioner, the lists might be made available to public inspection 'in such other

places' as he might determine, conceivably in places so numerous and so public as to bring the information to the attention of a very large number of the people. What reason could the legislature have had to empower an official to advertise widely that which it would be a criminal offense for a citizen to distribute in pamphlet form?

"The purpose of the amendments and additions to section 257 of the act of 1924 is plain. Congress determined to abandon the policy of secreting the amount of taxes paid from the general public. It was doubtless thought that thereby the chances of fraud, of favoritism, of improper concealment of income might be reduced. Every citizen informed as to the amount of taxes paid by his fellows would become a possible source of information to the Government. The taxpayers and the officials would be the more likely to do their full duties. No other explanation satisfactory accounts for the changes in the law. Bearing this in mind, one perceives that it is counter to the very spirit of the law to punish those who, by added publicity, materially assist to accompany the very object which Congress had in view. To give consistency and clearness to the statute, it is necessary to hold that Congress had no intention to apply the penalties against printing and publishing to so much of the returns as should be given out on the commissioner's lists. As to other parts of the returns the prohibition remains in effect."

PRINT OR PUBLISH.

The language of the prohibition contained in R. S. 3167 is that it shall be unlawful for any person to "PRINT *or* PUBLISH *in any manner whatever not provided by law.*" The earlier parts of the same section make it unlawful for any collector, deputy collector, agent, clerk or other officer, or any employe of the United States "to divulge or make known in any manner whatever not prohibited

by law" certain specified items of information, or to permit any income return or copy thereof in any book "to be seen or examined by any person except as provided by law."

We thus have the prohibition in three forms. As affecting public officers only, they are prohibited from "divulging or making known" or "permitting copies to be seen or examined," and as to all persons including public officers, the prohibition is against "printing or publishing." As to all these prohibitions, there is the exception that they do not apply to anything authorized by law to be divulged or seen or published. It is therefore necessary to seek in other parts of the Act the authorizations which limit the prohibitions of R. S. 3167.

The indictment in this case (Record p. 1) charges the defendant, The Baltimore Post Company, with printing AND publishing. In the court below, counsel for the Government undertook to construe the language of R. S. 3167 to mean "publish by printing."

The Government conceded that, under the usual definition of the word "publish," Section 257 of the Act of June 2, 1924 required the collector to publish the data in question when it required him to exhibit and make available for public inspection lists containing them. The Government further conceded that the Act could not rationally be interpreted to mean that persons who inspected the lists in the collector's office would be subject to indictment if they subsequently disclosed to others, by word of mouth, information they got by so doing. Indeed in the course of the trial, it was admitted, by those representing the Government, that a person might inspect the list in the collector's office and thereafter lawfully announce by radio the data he had seen in such a

list but that he was prohibited from publishing by printing. Apart from this being an unreasonable interpretation of the statute, there is no comfort for it in the language of the statute itself, since by the language of the law the prohibition is against printing *or* publishing. It would seem clear that a person who printed, but did not circulate, a copy of an income tax return could hardly be punished for so doing. It would seem equally clear that a person who had accidentally or improperly gained knowledge of the contents of an income tax return and published it, without printing, by industriously circulating its contents by word of mouth, or in writing, or by radio, would be guilty, since he would be publishing the thing which the statute clothes with secrecy.

A MUCH MORE RATIONAL INTERPRETATION OF THE WHOLE SECTION IS THAT THE LAST CLAUSE MAKES IT UNLAWFUL FOR ANY PERSON TO PRINT AND PUBLISH, OR OTHERWISE TO PUBLISH, THE THINGS WHICH, IN THE EARLIER PART OF THE SECTION, THE COLLECTOR, DEPUTY COLLECTOR, AGENT, CLERK AND OTHER OFFICER OR EMPLOYE OF THE UNITED STATES ARE PROHIBITED FROM DIVULGING OR MAKING KNOWN OR PERMITTING UNAUTHORIZED PERSONS TO SEE OR EXAMINE. WHEN THE SECTION IS SO INTERPRETED, INCOME TAX RETURNS, COPIES THEREOF, ABSTRACTS AND PARTICULARS THEREFROM ARE ALL PROHIBITED FROM BEING DISCLOSED BY THOSE OFFICERS OF THE GOVERNMENT WHO ARE CALLED UPON TO DEAL WITH THEM OFFICIALLY AND TO HAVE THEM IN THEIR CUSTODY AND WITHIN THEIR KNOWLEDGE, AND THE SAME THINGS ARE PROHIBITED FROM BEING PRINTED AND SO PUBLISHED, OR OTHERWISE PUBLISHED BY PERSONS WHO, BY ACCIDENT OR OTHERWISE, PROCURE INFORMATION AS TO THEIR CONTENTS.

With regard both to the agents of the Government and other persons, however, the prohibition extends only

to things not authorized to be divulged or made known or seen or examined or published by other parts of the of the Act. Therefore, the language of section 257 of the Act of June 2, 1924 exempts from these prohibitions the data which are the subject matter of the controversy here.

The foregoing might well dispose of the whole question here under discussion except for one other view of the Government's contention, namely, that the publicity of the collector's lists, directed by Section 257 of the Revenue Act, is limited publicity, and that Congress had the power and had the intention of prescribing the exact quantum of publicity it intended such lists to have. Therefore, it is argued that newspaper publication goes further than was intended by the revocation of the rule against secrecy, and that the defendant here was still prohibited from publishing in its newspaper the facts which the collector was directed to expose in his office for public inspection.

Putting on one side the constitutional question which would be raised by such a construction and which will be next considered, it is respectfully submitted that this contention is without merit.

By paragraph (b) of the Revenue Act, the commissioner is not merely directed to prepare these lists and expose them in his own office, but he is directed to make them available to public inspection, in such manner as he may determine, in the office of the collector in each internal revenue district, and in such other places as he may determine. That is to say, the commissioner in each district is free, having prepared the lists containing the name and amounts of taxes paid by the tax payers in his district to post the same in his office upon public bulletin boards and other conspicuous places in his dis-

trict, if he sees fit. He is free to adopt whatever means, in his judgment, are appropriate to make these lists available for public inspection. He could, therefore, have printed them in pamphlet form and circulated them, or, if he had public funds available for the purpose, he could have caused them to be printed in newspapers, all in furtherance of the mandate that he make them available to public inspection. No limited public inspection is in contemplation. Not a word in this statute authorizes the collector to inquire why any member of the public wishes to see the lists and accord or deny the privilege of seeing them as he may approve or disapprove of the motive of the inquiry. No part of the public is authorized to see one part of the lists and not other parts of the lists. All of the lists in the district are to be made available for inspection by the whole public of the district.

POLICY OF THE LAW.

We may take sides as we see fit on the question of the wisdom of publicity in such matters. Undoubtedly there are two possible views,—either that more complete and frank disclosures will be secured from taxpayers who are assured that their private affairs will be protected from the curious, or that larger revenues will be collected when all taxpayers have a right to inspect the amounts paid by their neighbors and to call the attention of the public authorities to what they believe to be inadequate payments by persons whose circumstances they know.

But the determination of this question lies with the Legislature, and the Congress having determined that the lists, containing the limited data specified, shall be made available to public inspection, the wisdom of that

course is no longer an open question. Every agency which facilitates public inspection and makes the lists more available for that purpose is in furtherance of the legislative intent.

It is, therefore, on this branch of the case, respectfully submitted, that both on the ground of the plain intent of the Legislature and the express language of the statute, the names, post office addresses and amount of tax paid are, by law, authorized to be made public and are, therefore, excluded from the prohibitions of R. S. 3167, and the demurrer to the indictment was properly sustained on this ground.

THE CONSTITUTIONAL QUESTION.

Should the Court hold, against the contentions of the defendant, that the data published in the Baltimore Post, and drawn from an inspection of the commissioner's list did, in fact, constitute a part of an income return, and further that it was the intent of Congress to prohibit the publication of such data by printing them in a newspaper and not to except them from the prohibitions contained in R. S. 3167 by authorizing their public inspection, then it is respectfully submitted that a constitutional question arises.

The First Amendment to the Constitution of the United States provides that *"Congress shall make no law * * * abridging the freedom of speech or of the press."*

It would, of course, be absurd to suppose that the intent of Congress in Section 257-b of the Revenue Act of June 2, 1924, was to authorize the public to inspect the lists, required to be made available by the collector, but at the same time to impose an obligation of complete silence upon all who made such inspection. A rational

purpose for the making of the lists and their inspection by the public can only be found in freedom of discussion by the public as to the things shown in the lists. It may be that Congress might have authorized such public inspection and limited communication of the contents of the lists and comment thereon to official persons, designated to receive such comments, in the interest of a more perfect collection of the revenues, but the statute attempts no such provision and imposes no such restriction. The public, inclusively, is authorized to inspect the lists and the collector is directed to make them available for such inspection, with no discretion in the commissioner except as to the number of places he shall post the lists or otherwise exhibit them in order to make them adequately available. It must, therefore, be conceded that Congress intended the data in the lists to be published, at least in the sense that their contents were to be made known, and that, having been so made known, they were the subject of further publication by word of mouth from those who took the trouble to inspect the lists and learn their contents.

The correctness of the foregoing has been conceded by counsel for the government in all of these prosecutions but the indictment is based upon the further contention by the government that the words "publish or print" contained in R. S. 3167 mean "publish *by* printing." The language of the indictment in this case is that this defendant did "print *and* publish." In other words, the Government contends that there is complete *freedom of speech* as to the data contained in the lists, *but a denial of the right to publish* by printing. This drives a wedge between freedom of speech and freedom of the press, and presents the situation of a great body of facts, affecting the transaction of the public business,

as to which the public is entitled to complete information and which public officers are charged to make available for the public and as to which the public may freely comment, but which it is a crime for a newspaper to print.

We respectfully submit that the freedom of the press guaranteed by the First Amendment to the Constitution consists of THE RIGHT OF THE PRESS FREELY TO PRINT WHATEVER ANY ONE MAY LAWFULLY SAY TO EVERY ONE.

The history of the adoption of the first ten amendments is too well known to require restatement. This Court held, in *United States vs. Cruikshank,* 92 U. S. 542-552, that the right of peaceable assembly, which is one of the rights guaranteed against hostile legislation by Congress by the First Amendment, is an attribute of national citizenship and it follows, as stated by Mr. Justice Harlan in his dissenting opinion in *Patterson vs. Colorado,* 205 U. S. 464, that the right of free speech and of free press is likewise a characteristic of national citizenship. The right of free speech and a free press is, however, not an absolute right and the limitations on it are summarized in the opinion of this Court in *Robertson vs. Baldwin,* 165 U. S. 275-281, where it is said:

> "The law is perfectly well settled that the first ten amendments of the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government but simply to embody certain guaranties and immunities, which we had inherited from our English ancestors and which had, from time immemorial, been subject to certain well recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions which continued to be recognized as if they had been for-

mally expressed. Thus the freedom of speech and of the press (Article 1) does not permit the publication of libels, blasphemous or indecent articles or other publication injurious to public morals or private reputations * * *."

Conspicuous illustrations of exceptions are found in *Schenck vs. U. S.*, 249 U. S. 47 and *Frowerk vs. U. S.*, 249 U. S. 204. In the *Schenck* case it is said in the syllabus:

"Words which ordinarily and in many places would be within the freedom of speech protected by the First Amendment may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about substantive evils which Congress has a right to prevent. The character of every act depends upon the circumstances in which it is done."

Similarly in the *Frowerk* case, it is said:

"The First Amendment, while prohibiting legislation against free speech as such, cannot have been and obviously is not intended to give immunity for every possible use of language."

FREE SPEECH AND FREE PRESS ARE BUT DIFFERENT ASPECTS OF THE SAME RIGHT.

So far as we have been able to discover, no legislature has attempted to draw a distinction between free speech and a free press, and no court has intimated the existence of any such distinction. Text writers have regarded the two as identical and each as the measure of the other. Thus in 6 R. C. L. pages 254 and 255, it is said:

"The primary meaning of liberty of the press, as understood at the time our early constitutions

were framed, was freedom from any censorship of the press and from all such restraints upon publications as had been practiced by monarchial or despotic governments in order to stifle efforts of patriots toward enlightening their fellow subjects upon their rights and as to the duties of their rulers. The freedom of the press consists, therefore, of the right, without any previous license or censorship, to publish the truth with good motives and for justifiable ends, whether it respects government, magistracy or individuals * * *. *Where a private citizen has the right to speak the truth in reference to acts of the government, of public officials or of individuals, the press is guaranteed the same right.*"

"*Words and Phrases,*" Vol. 5, page 4131, says:

"Liberty of the press, as used in the provision of the Federal Constitution guaranteeing the liberty of the press, etc., means a right in the conductor of a newspaper to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent that any one else would be held responsible for the publication."

For this definition numerous authorities are cited.

Further on the same page it is said:

"By the provisions of the federal and state constitutions guaranteeing the freedom of the press, it was simply intended to secure to the conductors of the press the same rights and immunities as are enjoyed by the public at large * * *. The press is guaranteed the same rights but no greater rights * * *. The press has precisely the same rights (as the private citizen) but no more. The citizen may, in what he honestly believes to be in the interests of morals and good order and the suppression of immorality and disorder, criticize the acts of other individuals; so may the press."

CASES ON THE FIRST AMENDMENT.

An examination of all the cases in this Court involving the consideration of the First Amendment as to the freedom of the press will show that no restriction or limitation has ever been permitted that would not, in the nature of the case, have been imposed upon the publication of the matter in question by speech instead of by printing. Thus, in the case of *Robertson vs. Baldwin,* 165 U. S. 281, it was said that the First Amendment did not license or exempt from liability for the publication of libels, blasphemous or other indecent articles or other publications injurious to morals or private reputations. Obviously, all of these offenses may be punished when they are committed by word of mouth, as well as by writing or printing.

In *Toledo Newspaper Co. vs. United States,* 247 U. S. 402 it was held that the constitutional freedom of the press would not protect the publisher of a newspaper, in publishing articles concerning a pending case, from contempt proceedings, when the article tends to obstruct the administration of justice. Clearly the inherent power of the courts to protect the orderly administration of justice by contempt proceedings reaches both speech and print to the extent necessary to prevent obstructions.

There are certain offenses against public morals which can only be committed by writing or printing or other reproduction, as, for instance, the advertisement of lottery tickets and the exhibition of degrading motion pictures. This Court has accordingly held that a statute prohibiting the mailing of a newspaper containing an advertisement of a lottery does not abridge the freedom of the press, *In re Rapier,* 143 U. S. 134, although here a distinction seems to be drawn to the effect that the circulation of the newspaper is not prohibited, but merely the

use of a facility of the government, which the government declines to have used in a matter which it regards as injurious to public morals.

In *Mutual Film Corporation vs. Ohio,* 236 U. S. 230, an act of the Legislature of the state of Ohio creating a board of motion picture film censors was held constitutional. It was contended in that case that the statute violated the right of free speech and publication guaranteed by the Ohio Constitution, but the court rejected the analogy between motion pictures and the press, and held that the police power to restrain and regulate theatrical exhibitions was the basis of the censorship, and that there was no restraint upon the freedom of speech or of the press involved in the act.

LIMITATIONS UPON FREE SPEECH AND FREE PRESS.

In both Federal and State Courts and under both Federal and State Constitutions, it has been held that the right of free speech and free press does not guarantee immunity against contempt proceedings where justice is being obstructed; against incitement to sedition or crime, or against slander or libel. All of the foregoing are illustrated by the cases cited above and there should be added to them the case of *Abrams vs. United States,* 250 U. S. 616, where the offense consisted of the uttering of circulars intended to provoke and encourage resistance to the United States in the war with Germany, and by inciting and advocating, through such circulars, resort to a general strike of workers in ammunition factories for the purpose of curtailing production of ordnance and munitions essential to the prosecution of the war.

CONCLUSION.

In the light of the foregoing, it is respectfully submitted that it is impossible to attribute to Congress the intention to authorize complete freedom of speech with regard to the data required to be made available for public inspection by the exhibition of the commissioner's lists, and at the same time to make criminal the publication of those data in the defendant's newspaper.

There is no sound measure of the extent of the rights of a free press except the right of free speech by a free people. On both principal and authority, citizens of the United States may speak and print with equal freedom whatever they desire to say, and may be punished in either case, upon like canons of judgment, for an abuse of the privilege. *The very suggestion that there is a distinction between freedom of speech and the freedom of the press implies a lack of freedom in one or the other.*

There are, of course, communications of a privileged character which may be made to limited classes of persons as to which newspaper publication would be a breach of the privilege, by extending the publication beyond those to whom it may properly be made, but the data of the commissioner's lists have no such character. They are made available to public inspection, which means the entire public.

There being no question of libel, slander, contempt, incitement to sedition or breach of privilege, as to communications otherwise confidential, the defendant here had as large a right to print what it learned from the commissioner's lists as any citizen had to communicate the same information by word of mouth. It therefore

follows that the construction given by the government to the language of R. S. 3167 and Section 257-b of the Revenue Act of June 2, 1924, must be rejected, since any such construction results in attributing to Congress an attempt to create a crime, which, by its very definition, would violate the immunities guaranteed by the First Amendment.

Respectfully submitted,

NEWTON D. BAKER,

Counsel for Defendant.

APPENDIX.

REVENUE ACT OF JUNE 2, 1924.

GROSS INCOME DEFINED.

SEC. 213. For the purpose of this rule, except as otherwise provided in section 233—

(a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.

(b) The term "gross income" does not include the following items, which shall be exempt from taxation under this title:

(1) The proceeds of life insurance policies paid upon the death of the insured;

(2) The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment, or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon surrender of the contract;

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

(4) Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (B) securities issued under the provisions of the Federal Farm Loan Act, or under the provisions of such Act as amended; or (C) the obligations of the United States or its possessions. Every person owning any of the obligations or securities enumerated in clause (A), (B), or (C) shall, in the return required by this title, submit a statement showing the number and amount of such obligations and securities owned by him and the income received therefrom, in such form and with such information as the Commissioner may require. In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit), the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt to the taxpayer from income taxes;

(5) The income of foreign governments received from investments in the United States in stock, bonds, or other domestic securities, owned by such foreign governments, or from interest on deposit in banks in the United States of moneys belonging to such foreign

governments, or from any other source within the United States;

(6) Amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness;

(7) Income derived from any public utility or the exercise of any essential governmental function and accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, or income accruing to the Government of any possession of the United States, or any political subdivision thereof.

* * * * *

DEDUCTIONS ALLOWED INDIVIDUALS.

SEC. 214. (a) In computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity;

(2) All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred

or continued or to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title;

(3) Taxes paid or accrued within the taxable year except (A) income, war-profits, and excess-profits taxes imposed by the authority of the United States, (B) so much of the income, war-profits and excess-profits taxes, imposed by the authority of any foreign country or possession of the United States, as is allowed as a credit under section 222, (C) taxes assessed against local benefits of a kind tending to increase the value of the property assessed, and (D) taxes imposed upon the taxpayer upon his interest as shareholder of a corporation, which are paid by the corporation without reimbursement from the taxpayer. For the purpose of this paragraph, estate, inheritance, legacy, and succession taxes accrue on the due date thereof except as otherwise provided by the law of the jurisdiction imposing such taxes;

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a non-resident alien individual only if the profit, if such transaction had resulted in a profit, would be taxable under this title. No deduction shall be allowed under this paragraph for any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty

days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition. If such acquisition or the contract or option to acquire is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed;

(6) Losses sustained during the taxable year of property not connected with the trade or business (but in the case of a non-resident alien individual only property within the United States) if arising from fires, storms, shipwreck, or other casualty, or from theft, and if not compensated for by insurance or otherwise. The basis for determining the amount of the deduction under this paragraph, or paragraph (4) or (5), shall be the same as is provided in section 204 for determining the gain or loss from the sale or other disposition of property;

(7) Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part;

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence;

(9) In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reason-

able allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary. In the case of leases the deduction allowed by this paragraph shall be equitably apportioned between the lessor and lessee;

(10) Contributions or gifts made within the taxable year to or for the use of: (A) The United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes; (B) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; (C) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act; (D) posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or (E) a fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals; to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this paragraph, except that if in the taxable year and in each of the ten preceding taxable years the amount in all the above cases

combined exceeds 90 per centum of the taxpayer's net income for each such year, as computed without the benefit of this paragraph, then to the full amount of such contributions and gifts made within the taxable year. In case of a non-resident alien individual this deduction shall be allowed only as to contributions or gifts made to domestic corporations, or to community chests, funds, or foundations, created in the United States, or to such vocational rehabilitation fund. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary.

* * * * *

CREDITS ALLOWED INDIVIDUALS.

SEC. 216. For the purpose of the normal tax only there shall be allowed the following credits:

(a) The amount received as dividends (1) from a domestic corporation other than a corporation entitled to the benefits of section 262, and other than a corporation organized under the China Trade Act, 1922, or (2) from a foreign corporation when it is shown to the satisfaction of the Commissioner that more than 50 per centum of the gross income of such foreign corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States as determined under the provisions of section 217;

(b) The amount received as interest upon obligations of the United States which is included in gross income under section 213;

(c) In the case of a single person, a personal exemption of $1,000; or in the case of the head of a family or a married person living with husband or wife, a personal exemption of $2,500. A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $2,500. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.

(d) $400 for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer if such dependent person is under eighteen years of age or is incapable of self-support because mentally or physically defective.

(e) In the case of a non-resident alien individual or of a citizen entitled to the benefits of section 262, the personal exemption shall be only $1,000. The credit provided in subdivision (d) shall not be allowed in the case of a non-resident alien individual unless he is a resident of a contiguous country, nor in the case of a citizen entitled to the benefits of section 262.

(f) (1) The credits allowed by subdivisions (d) and (e) of this section shall be determined by the status of the taxpayer on the last day of his taxable year.

(2) The credit allowed by subdivision (c) of this section shall, in case the status of the taxpayer changes during his taxable year, be the sum of (A) an amount which bears the same ratio to $1,000 as the number of months during which the taxpayer was single bears to 12 months, plus (B) an amount which bears the same ratio to $2,500 as the number of months during which the taxpayer was a married person living with husband or wife or was the head of a family bears to 12 months.

For the purposes of this paragraph a fractional part of a month shall be disregarded unless it amounts to more than half a month, in which case it shall be considered as a month.

(3) In the case of an individual who dies during the taxable year, the credits allowed by subdivisions (c), (d), and (e) shall be determined by his status at the time of his death, and in such case full credits shall be allowed to the surviving spouse, if any, according to his or her status at the close of the taxable year.

INDIVIDUAL RETURNS.

SEC. 223. (a) The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $2,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

RETURNS TO BE PUBLIC RECORDS.

SEC. 257. (a) *Returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President:* Provided, That the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, or a special committee of the Senate or House, shall have the right to call on the Secretary of the Treasury for, and it shall be his duty to furnish, any data of any character contained in or shown by the returns or any of them, that may be required by the committee; and any such committee shall have the right, acting directly as a committee, or by and through such examiners or agents as it may designate or appoint, to inspect all or any of the returns at such times and in such manner as it may determine; and any relevant or useful information thus obtained may be submitted by the committee obtaining it to the Senate or the House, or to both the Senate and House, as the case may be: Provided further, That the proper officers of any State may, upon the request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of the

corporation, at such times and in such manner as the Secretary may prescribe: Provided further, That all bona fide shareholders of record owning 1 per centum or more of the outstanding stock of any corporation shall, upon making request of the Commissioner, be allowed to examine the annual income returns of such corporation and of its subsidiaries. Any shareholder who pursuant to the provisions of this section is allowed to examine the return of any corporation, and who makes known in any manner whatever not provided by law the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any such return, shall be guilty of a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both.

(b) *The Commissioner shall as soon as practicable in each year cause to be prepared and make available to public inspection in such manner as he may determine, in the office of the collector in each internal-revenue district and in such other places as he may determine, lists containing the name and the post office address of each person making an income tax return in such district, together with the amount of the income tax paid by such person.*

EXAMINATION OF RETURN AND DETERMINATION OF TAX.

SEC. 271. As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax.

"Revised Statutes, Sec. 3167. It shall be unlawful for *any collector,* deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law

to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and *it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return or any part* thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.''